

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

RICHARD M. KENNEDY, III,)

)

PLAINTIFF,)

)

-VERSUS-)

3:15-CV-01844

)

AUGUST 2, 2018

ROBERT WILKIE, SECRETARY)

COLUMBIA, SC

OF THE US DEPARTMENT OF)

VOLUME II OF II

VETERANS AFFAIRS,)

)

DEFENDANTS.)

)

-----)

BEFORE THE HONORABLE MARGARET B. SEYMOUR
UNITED STATES DISTRICT JUDGE, PRESIDING
BENCH TRIAL

***** REDACTED TRANSCRIPT *****

A P P E A R A N C E S:

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STENOTYPE/COMPUTER-AIDED TRANSCRIPTION

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1 MR. IRVIN: GOOD MORNING, YOUR HONOR.

2 THE COURT: YOU MAY CALL YOUR NEXT WITNESS.

3 MR. IRVIN: THANK YOU, YOUR HONOR. WHEN WE WERE
4 CONCLUDING YESTERDAY, WE TALKED ABOUT DR. KURT FICHTNER -- IS
5 HOW HE PRONOUNCES IT -- HE'S ON THE WITNESS LIST, AND HE'S
6 THE ONE, YOUR HONOR, THAT HAS A SERIOUS MEDICAL CONDITION AND
7 HAS BEEN OUT FOR TREATMENTS, AND WE'VE JUST DECIDED THAT
8 RATHER THAN ME PUT MRS. FULMER UP AND US GOING THROUGH THE
9 READING HIS DEPOSITION TESTIMONY, THAT WE ARE SIMPLY GOING TO
10 SUBMIT YOUR HONOR THE PORTIONS OF THE TESTIMONY THAT WE PUT
11 INTO EVIDENCE.

12 AND MR. ANDREWS, I WILL TELL YOU, THAT I -- I UNDERSTAND
13 THAT MY LONG-TIME ASSISTANT ACTUALLY PUT MORE
14 COUNTER-DESIGNATIONS INTO THIS AND SO YOUR
15 COUNTER-DESIGNATIONS WOULD BE PUT -- BY ALL MEANS CHECK ME,
16 AND IF WE LEFT SOMETHING OUT...

17 MR. ANDREWS: I WILL DO THAT. AND I WILL JUST SAY,
18 YOUR HONOR, WE HAVEN'T REVIEWED THOSE YET. I TAKE MR. IRVIN
19 AT HIS WORD. WE WILL REVIEW IT, BUT IF FOR WHATEVER REASON
20 WE SEE THERE'S SOMETHING WRONG, WE WILL RAISE THAT OBJECTION.

21 MR. IRVIN: WE WOULDN'T HAVE ANY PROBLEM WITH -- I
22 DID INCORPORATE TO THE BEST OF MY REPRESENTATION TO THE COURT
23 THIS MORNING THE COUNTER-DESIGNATIONS THAT I UNDERSTOOD THEY
24 WANTED. BUT IF THEY WANT SOME MORE, WE WOULDN'T HAVE ANY
25 OBJECTION.

1 THE COURT: OKAY. THAT'S FINE. AND COULD YOU GIVE
2 THE COURT, THE CLERK OF COURT, THE ORIGINAL?

3 THE CLERK: I NEED THE ORIGINAL DEPOSITION.

4 MR. IRVIN: OKAY. THIS IS THE PORTION THAT WE ARE
5 SUBMITTING, AND I JUST WANTED THE COURT TO HAVE THAT.

6 THE CLERK: I NEED THE ORIGINAL.

7 MR. IRVIN: OH, I UNDERSTAND. SO THAT WILL
8 HOPEFULLY, YOUR HONOR, SAVE US A LITTLE BIT OF TIME.

9 THE COURT: IT WILL. THANK YOU VERY MUCH. WE
10 APPRECIATE IT. ALL RIGHT.

11 MR. IRVIN: MAY IT PLEASE THE COURT. THE WITNESS
12 THAT COMES NEXT ON THE LIST ACTUALLY WAS BEFORE DR. FICHTNER,
13 BUT IS DR. MCCALLUM, SO WE WOULD CALL DR. MCCALLUM AT THIS
14 TIME.

15 THE COURT: ALL RIGHT. THANK YOU.

16 (WITNESS ENTERED THE COURTROOM.)

17 THE COURT: ALL RIGHT. DR. MCCALLUM, YOU MAY COME
18 FORWARD.

19 DR. JAMES MCCALLUM, AFTER BEING DULY SWORN,
20 TESTIFIED AS FOLLOWS:

21 DIRECT EXAMINATION

22 BY MR. IRVIN:

23 Q GOOD MORNING, DR. MCCALLUM.

24 A GOOD MORNING.

25 Q I BELIEVE WE HAVE MET BEFORE. YOUR DEPOSITION WAS TAKEN

1 IN THE CASE AND I TOOK THAT DEPOSITION. DO YOU RECALL US

2 DOING THAT --

3 A I DO.

4 Q -- IN THE CASE? ALL RIGHT. AND YOUR DEPOSITION WAS

5 TAKEN ON FEBRUARY THE 29TH OF 2016. DO YOU RECALL GIVING

6 YOUR TESTIMONY?

7 A I DO RECALL GIVING MY TESTIMONY AND I BELIEVE IT WAS

8 ABOUT THEN.

9 Q OKAY. ALL RIGHT. NOW, YOU HAVE BEEN A PHYSICIAN AT THE

10 VA MEDICAL CENTER AT DORN FOR HOW LONG, SIR?

11 A ABOUT 14 YEARS.

12 Q DID YOU SAY 14?

13 A FOURTEEN, YES, SIR.

14 Q OKAY. AND WHAT IS YOUR SPECIALTY?

15 A INTERNAL MEDICINE.

16 Q I SEE. ALL RIGHT. AND HAVE YOU HAD THE OPPORTUNITY TO

17 SERVE AS A PANEL MEMBER ON WHAT WE HAVE BEEN REFERRING TO AS

18 THESE COMP PANELS OR --

19 A YES, SIR.

20 Q -- PAY PANELS?

21 A I HAVE.

22 Q AND THE PURPOSE OF THOSE PANELS IS TO REVIEW A STAFF

23 PHYSICIAN'S COMPENSATION EVERY SO OFTEN? WOULD THAT BE A

24 FAIR STATEMENT?

25 A THAT'S ONE OF THEM, CERTAINLY.

1 Q OKAY.

2 A IT WOULD ALSO BE TO RECOMMEND PAY FOR A NEW INCOMING
3 PHYSICIAN AS WELL.

4 Q YES. THANK YOU VERY MUCH. AND SO IT IS REALLY IN PART
5 A RECRUITMENT SORT OF ASPECT TO IT AND THEN A RETENTION
6 ASPECT TO THE REVIEWS AS WELL?

7 A I DON'T -- IT'S TO MAKE A RECOMMENDATION FOR PAY. AS
8 FAR AS WHETHER SERVES AS RECRUITMENT OR RETENTION, THAT WOULD
9 BE I GUESS IN THE EYES OF THE BEHOLDER, SO...

10 Q OKAY. I JUST SAID THAT BECAUSE YOU MENTIONED IT APPLIED
11 TO INCOMING NEW PHYSICIANS THAT ARE BEING RECRUITED INTO DORN
12 AS WELL AS TO THOSE WHO ARE ALREADY THERE --

13 A CORRECT.

14 Q -- WHO COME UP FOR REVIEW PERIODICALLY.

15 A CORRECT.

16 Q OKAY. AND SO YOU'VE SERVED ON A BUNCH OF THESE PANELS
17 OVER YOUR 14 YEARS AT DORN?

18 A I HAVE.

19 Q OKAY. YOU'RE STILL AT DORN?

20 A I AM.

21 Q OKAY. AND IN THE SAME CAPACITY AS A STAFF PHYSICIAN IN
22 INTERNAL MEDICINE?

23 A AMONG OTHER CAPACITIES.

24 Q OKAY. ALL RIGHT. NOW, AS I UNDERSTAND IT FROM YOUR
25 TESTIMONY THAT YOU GAVE IN THE DEPOSITION, YOU BELIEVE THAT

1 IT IS THE COMP PANEL'S JOB TO LOOK AT THE ANNUAL PAY OF THE
2 PHYSICIAN UNDER REVIEW. IS THAT A FAIR STATEMENT?

3 A THAT'S A FAIR STATEMENT.

4 Q ALL RIGHT. AND BASE PAY -- YOU KNOW GENERALLY WHAT BASE
5 PAY IS; THAT ELEMENT OF THE PHYSICIAN'S PAY?

6 A YES, SIR.

7 Q THAT'S A LONGEVITY TABLE NUMBER?

8 A UH-HUH. IT IS, YES.

9 Q OKAY. SO THE TWO COMPONENTS THAT MAKE UP ANNUAL PAY
10 BEING BASE PAY AND MARKET PAY.

11 A CORRECT.

12 Q YOU AGREE WITH ME THERE? ALL RIGHT. THOSE TWO
13 COMPONENTS ARE, AS I UNDERSTAND YOUR PRIOR TESTIMONY, ARE NOT
14 CONSIDERED SEPARATELY BY THE PANEL; IS THAT A FAIR STATEMENT?

15 A THAT'S CORRECT.

16 Q THE PANEL AT LEAST IN YOUR EXPERIENCE OVER 14 YEARS
17 CONSIDERS THE OVERALL ANNUAL PAY NUMBER.

18 A THAT'S CORRECT.

19 Q OKAY. ALL RIGHT. NOW, WOULD IT BE FAIR TO SAY THAT IN
20 THE PANELS -- AT LEAST THAT YOU HAVE EXPERIENCE IN -- WHEN
21 THAT ANNUAL PAY NUMBER IS CONSIDERED AND EVENTUALLY ARRIVED
22 AT EITHER BY RECOMMENDATION FROM THE SERVICE LINE CHIEF OR IF
23 THERE IS SOME CHANGE THAT'S MADE, BUT ONCE THAT NUMBER IS
24 ARRIVED AT AND THE PANEL RECOMMENDS WHATEVER IT IS -- LET'S
25 JUST SAY \$275,000 FOR ANNUAL PAY -- THEN THAT'S PRETTY MUCH

1 THE PANEL'S -- THE END OF THE PANEL'S JOB. WOULD THAT BE
2 FAIR TO SAY? I KNOW YOU GOT TO SIGN THE FORMS, BUT YOU DON'T
3 GET INTO...

4 I APOLOGIZE. MY QUESTIONS ARE GETTING TOO LONG. YOU
5 DON'T GET INTO LOOKING UP THE LONGEVITY TABLES TO TRY TO
6 FIGURE OUT WHAT BASE PAY IS.

7 A THAT'S CORRECT.

8 Q OKAY. AND YOU DON'T TRY REALLY TO DO ANYTHING
9 SPECIFICALLY WITH RESPECT TO MARKET PAY?

10 A YOU'RE GOING TO HAVE TO EXPLAIN WHAT YOU MEAN A LITTLE
11 MORE THAN THAT --

12 Q OKAY.

13 A -- IN ORDER TO ANSWER THAT.

14 Q YOU JUST TESTIFIED THAT THE PANEL DOESN'T FOCUS ON BASE
15 PAY OR MARKET PAY, THE PANEL FOCUSES ON ANNUAL PAY.

16 A THAT'S CORRECT.

17 Q AND WHAT I'M TRYING TO GET AT IS ONCE YOU DO YOUR JOB
18 AND FOCUS ON ANNUAL PAY AND MAKE A DECISION ABOUT THAT AND
19 YOU ALL SIGN OFF ON THAT, IS THAT PRETTY WELL THE END OF YOUR
20 RESPONSIBILITIES OF THE PANEL MEMBER, MEMBERS WITH RESPECT TO
21 THAT PARTICULAR PHYSICIAN REVIEW?

22 A AS I UNDERSTAND YOUR QUESTION, YES.

23 Q OKAY. IS THERE SOMETHING ABOUT MY QUESTION THAT YOU
24 DON'T UNDERSTAND? I'LL BE GLAD TO TRY TO--

25 A NO, I THINK SO. I THINK, YES, SIR, THAT'S MY

1 UNDERSTANDING, YES.

2 Q OKAY. NOW, I BELIEVE THAT YOU HAVE TOLD ME THAT AT THE
3 FEBRUARY 2014 COMP PANEL REVIEW THAT YOU SERVED ON FOR DR.
4 KENNEDY -- DO YOU RECALL THAT?

5 A I DON'T RECALL THE SPECIFIC PANEL TO BE HONEST WITH YOU.
6 I DO RECALL THAT I CERTAINLY WAS ON THAT ONE BASED ON THE
7 DOCUMENTATION.

8 Q OKAY. YOU'VE REVIEWED THE DOCUMENTATION?

9 A CORRECT.

10 Q AND YOU CAN CONFIRM THAT YOU --

11 A I WAS ON IT.

12 Q -- YOU SIGNED -- YEAH.

13 A I DON'T RECALL THE ACTUAL EVENT, SO, YES, SIR.

14 Q YOU SIGNED OFF ON --

15 A CORRECT.

16 Q -- THAT COMP PANEL REVIEW. AND I BELIEVE THAT AT THAT
17 COMP PANEL REVIEW YOU WEREN'T GIVEN ANY OF THE MARKET PAY
18 INFORMATION ABOUT ANY OF THE OTHER ANESTHESIOLOGISTS IN THE
19 DEPARTMENT; WERE YOU?

20 A WE WOULD NOT HAVE BEEN.

21 Q OKAY. AND SO, YOU DIDN'T HAVE ANY OF THAT INFORMATION
22 FOR COMPARISON PURPOSES.

23 A NO.

24 Q OKAY. ALL RIGHT. AND AS I UNDERSTAND IT, WHAT YOU HAVE
25 JUST DESCRIBED ABOUT HOW THAT PANEL PROCESS WORKS WITH

1 RESPECT TO DR. KENNEDY WOULD BE CONSISTENT BY AND LARGE WITH
2 ALL OF THE PANELS THAT YOU HAVE SERVED ON. WOULD THAT BE A
3 FAIR STATEMENT?

4 A THAT WOULD BE A FAIR STATEMENT.

5 Q OKAY. THANK YOU VERY MUCH, DR. MCCALLUM. PLEASE ANSWER
6 ANY QUESTIONS THAT COUNSEL FOR THE VA MAY HAVE FOR YOU.

7 CROSS-EXAMINATION

8 BY MR. ANDREWS:

9 Q GOOD MORNING, DR. MCCALLUM.

10 A GOOD MORNING.

11 Q I APPRECIATE YOU BEING WITH US THIS MORNING. I KNOW WE
12 DIDN'T GIVE YOU MUCH OF A CHOICE, BUT WE APPRECIATE IT ANY
13 WAY. I BELIEVE YOU JUST TESTIFIED THAT YOUR ROLE ON THE
14 COMPENSATION PANEL AS YOU VIEWED IT WAS TO RECOMMEND ANNUAL
15 PAY.

16 A THAT'S CORRECT.

17 Q IS THAT CORRECT?

18 A THAT IS CORRECT.

19 Q OKAY. AND I BELIEVE YOU ALSO TESTIFIED THAT THE BASE
20 PAY COMPONENT OF ANNUAL PAY IS NOT SOMETHING THAT YOU WOULD
21 CALCULATE; IS THAT RIGHT?

22 A THAT'S CORRECT.

23 Q WOULD HR TAKE CARE OF THAT?

24 A HR WOULD TAKE CARE OF THAT.

25 Q OKAY. AND THE OTHER VARIABLE OF ANNUAL PAY IS MARKET

1 PAY; IS THAT CORRECT?

2 A THAT IS CORRECT.

3 Q SO WHEN YOU'RE RECOMMENDING ANNUAL PAY, IS IT FAIR TO
4 SAY THAT YOU'RE ALSO RECOMMENDING MARKET PAY?

5 A WELL, THE ONLY VARIABLE PART OF THE PAY IS IN FACT THE
6 MARKET PAY. THE OTHER IS SET. SO YES, WE ARE EFFECTIVELY
7 RECOMMENDING ANNUAL PAY TAKING MARKET PAY INTO CONSIDERATION.

8 Q OKAY. NOW IN THE COURSE OF YOUR REVIEW AND
9 RECOMMENDATION OF ANNUAL PAY, WERE THERE CERTAIN FACTORS THAT
10 YOU CONSIDERED AS PART OF THAT PROCESS?

11 A THERE ARE.

12 Q YOU'VE HEARD OF THE SEVEN FACTORS?

13 A THERE ARE SEVEN FACTORS AND WE ALSO HAVE A
14 REPRESENTATIVE FROM HR THERE WITH US TO MAKE SURE THAT WE ARE
15 TAKING INTO CONSIDERATION THOSE SEVEN FACTORS.

16 Q OKAY. AND LET'S TALK ABOUT THOSE SPECIFICALLY.

17 A OKAY.

18 Q I WANT TO WALK YOU THROUGH THEM. SO IN CONSIDERING A
19 PAY RECOMMENDATION, DID YOU CONSIDER THE DOCTOR'S EXPERIENCE
20 IN THAT PARTICULAR SPECIALTY?

21 A THAT'S ONE OF THEM, CERTAINLY.

22 Q AND WHEN WE TALK ABOUT EXPERIENCE, I SHOULD ALSO ADD
23 WOULD THAT INCLUDE BOTH QUANTITATIVE EXPERIENCES IN YEARS OF
24 SERVICE AND ALSO QUALITATIVE EXPERIENCE AS IN THE RICHNESS OF
25 THAT EXPERIENCE?

1 A CORRECT.

2 Q OKAY. HOW ABOUT THE PARTICULAR NEED FOR THAT SPECIALTY
3 AT THE HOSPITAL?

4 A ABSOLUTELY.

5 Q OKAY. HOW ABOUT RELEVANT MARKET SALARY DATA LIKE THE
6 HAY SURVEY OR OTHER SURVEY--

7 A HAY SURVEY AND THE DOUBLE A MC SURVEY AND WHATEVER
8 THAT -- IN ALL HONESTY, THOSE HAVE EVOLVED OVER TIME, SO MOST
9 RECENT ARE THE HAY AND THE DOUBLE A MC. WE'VE USED OTHERS AT
10 OTHER TIMES AS WELL, BUT THE BEST DATA WE CAN GET.

11 Q OKAY. THE BEST -- WHATEVER DATA YOU CAN GET ABOUT THE
12 RELEVANT LABOR MARKET. WOULD THAT BE FAIR TO SAY?

13 A YES, IT WOULD.

14 Q OKAY. HOW ABOUT BOARD CERTIFICATION IN THEIR SPECIALTY?

15 A YES.

16 Q OKAY. ANY PARTICULAR ACCOMPLISHMENTS IN THEIR
17 SPECIALTY?

18 A YES.

19 Q OKAY. WHETHER THEY HAVE EXPERIENCE, IF ANY, AT THE VA?

20 A THAT... IT WOULD DEPEND ON THE NATURE OF THE PARTICULAR
21 PHYSICIAN.

22 Q SURE. WOULD YOU TYPICALLY SEE A CV OR HAVE --

23 A YES.

24 Q -- SOME UNDERSTANDING OF WHAT THEIR BACKGROUND IS?

25 A YES.

1 Q SO YOU WOULD KNOW IF THEY HAD VA EXPERIENCE OR NOT. IS
2 THAT FAIR TO SAY?

3 A YES, CORRECT.

4 Q OKAY. AND HOW ABOUT ANY OTHER CONSIDERATIONS THAT MIGHT
5 BE DEEMED RELEVANT OR--

6 A YES.

7 Q OKAY. NOW, I WANT TO ASK YOU THIS BECAUSE I THINK IT'S
8 IMPORTANT. WHEN YOU CONSIDER THESE FACTORS, WERE YOU UNDER
9 ANY -- AS FAR AS YOU'RE AWARE WAS THERE ANY GUIDANCE OR ANY
10 INSTRUCTIONS THAT WERE GIVEN TO YOU ON HOW MUCH WEIGHT NEEDED
11 TO BE ASSIGNED TO ANY ONE OF THOSE FACTORS?

12 A NO.

13 Q AND IN FACT, IT COULD VARY ON A CASE-BY-CASE BASIS?

14 A IT DOES VARY ON A CASE-BY-CASE BASIS.

15 Q NOW, I BELIEVE YOU WERE ASKED A QUESTION ABOUT YOUR
16 SERVICE ON COMPENSATION PANELS AND I BELIEVE YOU ANSWERED IT
17 AFFIRMATIVELY TO A QUESTION THAT YOU HAD SERVED ON A BUNCH OF
18 COMPENSATION PANELS; IS THAT RIGHT?

19 A THAT'S CORRECT.

20 Q OKAY. YOU DON'T HAVE TO GIVE US ANY SPECIFICITY, BUT DO
21 YOU HAVE ANY IDEA HOW MANY COMPENSATION PANELS?

22 A A LOT. IT'S ONE OF THOSE THINGS WHERE I COULDN'T GIVE
23 YOU AN EXACT NUMBER. IF IT'S IN THE HUNDREDS, I WOULD NOT BE
24 SURPRISED.

25 Q IN THE HUNDREDS YOU WOULD NOT BE SURPRISED?

1 A CORRECT.

2 Q OKAY. I WOULD CONSIDER THAT A LOT. BUT THE -- LET ME
3 ASK YOU THIS. HAVE YOU SERVED -- WELL, YOU SERVED ON DR.
4 KENNEDY'S COMPENSATION PANEL; CORRECT?

5 A I DID.

6 Q AND HE'S AN ANESTHESIOLOGIST.

7 A CORRECT.

8 Q HAVE YOU SERVED ON COMPENSATION PANELS FOR DOCTORS IN
9 OTHER SPECIALTIES?

10 A MANY TIMES.

11 Q OKAY. COULD YOU NAME FOR US SOME OF THOSE SPECIALTIES?

12 A INTERNAL MEDICINE, SURGERY, WE ALSO DO DENTISTS,
13 PSYCHIATRY, PHYSICAL MEDICINE REHABILITATION, PRIMARY CARE.
14 I THINK I'VE PROBABLY SERVED ON JUST ABOUT EVERY SPECIALTY WE
15 HIRE.

16 Q OKAY.

17 A I COULD NOT GUARANTEE THAT, BUT IT WOULD -- IT WOULDN'T
18 SURPRISE ME THERE AGAIN.

19 Q OKAY. NOW, IN YOUR EXPERIENCE SERVING ON THOSE
20 COMPENSATION PANELS, WERE THEY CONDUCTED ANY DIFFERENTLY THAN
21 THE COMPENSATION PANEL FOR DR. KENNEDY?

22 A NO. THEY ARE ALL CONDUCTED THE -- EXACTLY THE SAME WAY.

23 Q OKAY.

24 A LET ME REPHRASE THAT. THEY ARE ALL INDIVIDUALLY DONE,
25 BUT THE FORMAT IS SIMILAR, EXACTLY THE SAME. SO EACH ONE IS

1 CONSIDERED INDIVIDUALLY.

2 Q I UNDERSTAND. YOU'RE GOING TO CONSIDER EACH DOCTOR --

3 A CORRECT.

4 Q -- ON THEIR OWN MERIT.

5 A CORRECT.

6 Q IS THAT FAIR TO SAY?

7 A THAT'S FAIR TO SAY.

8 Q OKAY. THANK YOU. LET'S GO BACK A LITTLE BIT TO THE
9 MARKET DATA. I WANT TO MAKE SOMETHING CLEAR. NOW, WHEN
10 YOU'RE LOOKING AT MARKET DATA, IS THAT WHAT WE WOULD THINK OF
11 AS A SALARY? ARE YOU LOOKING AT RANGE -- SALARY RANGES THAT
12 MIGHT BE IN THE PRIVATE MARKET?

13 A EFFECTIVELY, YES.

14 Q AND SO IS IT FAIR TO SAY THAT IN ORDER TO DETERMINE
15 WHETHER YOU'RE GOING TO PAY A DOCTOR AT A RATE OF PAY THAT'S
16 FAIR AND REASONABLY COMPARABLE THAT YOU WOULD HAVE TO LOOK AT
17 WHAT THEIR EFFECTIVE SALARY WOULD BE, RIGHT, THE OVERALL
18 NUMBER. IS THAT FAIR TO SAY?

19 A THAT'S CORRECT.

20 Q AND WE WOULD LOOK AT THAT AS ANNUAL PAY; IS THAT
21 CORRECT?

22 A THAT'S CORRECT.

23 Q OKAY. NOW IN THE COURSE OF YOUR REVIEW OF THIS PRIVATE
24 MARKET DATA AND THE COURSE OF YOUR EXPERIENCES AS A DOCTOR,
25 WOULD THERE BE ANY GUARANTEE THAT A 60-YEAR-OLD DOCTOR IN

1 PRIVATE PRACTICE WOULD BE PAID MORE THAN A 50-YEAR-OLD

2 DOCTOR?

3 A NO.

4 Q WOULD THERE BE ANY GUARANTEE THAT A DOCTOR WITH 25 YEARS

5 EXPERIENCE WOULD BE PAID MORE THAN A DOCTOR WITH 15 YEARS

6 EXPERIENCE?

7 A NO.

8 Q IF THERE WERE TWO DOCTORS IN PRIVATE PRACTICE OF

9 REASONABLY-COMPARABLE EXPERIENCE, IS THERE ANY GUARANTEE THAT

10 THE OLDER DOCTOR WOULD BE PAID MORE?

11 A NONE THAT I'M AWARE OF.

12 Q OKAY. THE PRIVATE MARKET DOESN'T GUARANTEE THAT PAY IS

13 GOING TO GO UP WITH AGE; DOES IT?

14 A NO.

15 Q NOW, THE COMPENSATION PANELS DON'T HAVE FINAL PAY

16 AUTHORITY; DO THEY?

17 A THAT'S CORRECT.

18 Q THEY ONLY ISSUE A RECOMMENDATION TO THE APPROVING

19 OFFICIAL?

20 A THAT'S CORRECT.

21 Q NOW, THROUGHOUT YOUR SERVICE ON ALL THESE PANELS, WHICH

22 YOU'VE ESTIMATED COULD BE IN THE HUNDREDS, DID YOU TAKE YOUR

23 ROLE SERIOUSLY?

24 A YES, ABSOLUTELY.

25 Q DID YOU CONSIDER THE INFORMATION THAT WAS BROUGHT TO

1 YOU?

2 A WE DO JUST AS I'M -- GET RECOMMENDATIONS THE SAME WAY, I
3 WOULD HOPE THAT PEOPLE WHO ARE ON MINE WOULD TAKE THINGS INTO
4 CONSIDERATION AS WELL, SO IT'S...

5 Q BECAUSE WE HAVEN'T TALKED ABOUT THIS. SO YOU SERVED ON
6 COMPENSATION PANELS, BUT IS IT ALSO TRUE THAT YOUR ANNUAL PAY
7 IS UNDER CONSIDERATION BY OTHER PANELS OF DOCTORS, TOO?

8 A CORRECT.

9 Q OKAY. AND SO IF YOU DISAGREE WITH A RECOMMENDATION THAT
10 THE SERVICE LINE CHIEF BROUGHT FOR A DOCTOR'S ANNUAL PAY,
11 WOULD YOU HAVE APPROVED IT?

12 A NO.

13 Q OKAY. NOW, IN THE COURSE OF YOUR REVIEW OF DR.
14 KENNEDY'S PAY RECOMMENDATION, DO YOU RECALL ANYTHING THAT
15 FELT UNFAIR TO YOU OR UNJUSTIFIED?

16 A NO.

17 Q AND YOU SIGNED YOUR NAME TO THAT RECOMMENDATION --

18 A I DID.

19 Q -- DID YOU NOT? AND DO YOU STAND BY IT TODAY?

20 A I DO.

21 Q IF YOU HAD SEEN ANYTHING IN YOUR EXPERIENCE SERVING ON A
22 COMPENSATION PANEL THAT SUGGESTED TO YOU THAT OLDER DOCTORS
23 AT DORN WERE BEING UNFAIRLY TREATED BY THESE PAY PRACTICES
24 WOULD YOU HAVE APPROVED THEM?

25 A NO.

1 Q OKAY. I DON'T HAVE ANY FURTHER QUESTIONS. THANK YOU
2 VERY MUCH.

3 REDIRECT EXAMINATION

4 BY MR. IRVIN:

5 Q DR. MCCALLUM, JUST SO THAT WE CAN BE CLEAR THAT YOU'RE
6 NOT -- THAT YOUR TESTIMONY THAT YOU JUST GAVE TO MR. ANDREWS
7 IS IN LINE WITH WHAT YOU GAVE TO ME, I WANT TO MAKE SURE
8 ABOUT WHAT YOU SAID ON THOSE FACTORS AND SO FORTH. BUT WITH
9 RESPECT TO MARKET PAY, WOULDN'T IT BE THE CASE THAT ONCE YOU
10 AS A PANEL MAKE THE DETERMINATION OF ANNUAL PAY, THEN THE
11 MARKET PAY IS DICTATED SIMPLY BY TAKING THE ANNUAL PAY NUMBER
12 THAT YOU'RE MAKING A RECOMMENDATION ON AND SUBTRACTING FROM
13 IT THE BASE PAY NUMBER THAT COMES OFF OF SOME TABLE AND
14 THAT'S HOW YOU GET THE MARKET PAY?

15 A THAT'S CORRECT. IT'S THE ONLY VARIABLE PORTION.

16 Q AND IT'S CORRECT THAT THAT'S HOW IT'S DONE.

17 A TO MY UNDERSTANDING, YES.

18 Q THANK YOU VERY MUCH, DR. MCCALLUM.

19 MR. ANDREWS: I DON'T HAVE ANY FURTHER QUESTIONS,
20 YOUR HONOR.

21 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. YOU
22 CAN STEP DOWN. YOU'RE EXCUSED.

23 (WITNESS LEFT THE STAND.)

24 THE COURT: MAY CALL YOUR NEXT WITNESS.

25 MR. IRVIN: THANK YOU, YOUR HONOR. THE NEXT

1 WITNESS IS DR. AL-ASSAAD.

2 DR. ZIAD AL-ASSAAD, AFTER BEING DULY SWORN,
3 TESTIFIED AS FOLLOWS:

4 DIRECT EXAMINATION

5 BY MR. IRVIN:

6 Q GOOD MORNING, DR. AL-ASSAAD.

7 A GOOD MORNING.

8 Q MY NAME IS WILMOT IRVIN, AND YOU AND I HAVE MET BEFORE,
9 I BELIEVE. DO YOU RECALL GIVING YOUR DEPOSITION EARLIER IN
10 THE CASE?

11 A I THINK SO, YEAH, I REMEMBER.

12 Q YES, SIR.

13 A YES.

14 Q AND I REPRESENT -- I'M A LAWYER AND I REPRESENT DR. RICK
15 KENNEDY WHO IS SEATED HERE AT COUNSEL TABLE WITH ME.

16 A YES.

17 Q AND I JUST WANT TO ASK YOU A FEW QUESTIONS. AND WE --
18 LET ME FIRST JUST GET A LITTLE BIT OF INFORMATION ABOUT YOU.
19 AS I UNDERSTAND IT, YOU WERE CHIEF OF PATHOLOGY AND
20 LABORATORY AT DORN VA FOR 28 YEARS; IS THAT CORRECT?

21 A YES, SIR.

22 Q ARE YOU STILL EMPLOYED IN THAT POSITION TODAY?

23 A NO, SIR.

24 Q YOU -- I'M SORRY. I DIDN'T HEAR YOU.

25 A NO, SIR.

1 Q OKAY. YOU ARE RETIRED?

2 A I'M RETIRED.

3 Q WAY TO GO. BUT YOU SERVED -- DID YOU SERVE AS THE CHIEF
4 OF PATHOLOGY FOR 28 YEARS?

5 A YES, SIR.

6 Q WOW. OKAY. ALL RIGHT. AND OVER THAT PERIOD OF TIME
7 I'M GUESSING THAT YOU SERVED ON A GOOD MANY OF THESE
8 COMPENSATION PANELS THAT REVIEW PHYSICIAN PAY AT DORN?

9 A YES, SIR.

10 Q AND DR. AL-ASSAAD, AS I UNDERSTAND THE PROCESS, AS THE
11 CHIEF OF A SERVICE LINE, WHICH YOU WERE, PATHOLOGY AND
12 LABORATORY, SOMETIMES YOU WOULD BE CALLED UPON TO BE THE
13 PRESENTER OF A RECOMMENDATION FOR ANNUAL PAY TO ONE OF THESE
14 PANELS? DID YOU DO THAT WHEN SOME PHYSICIAN IN YOUR SERVICE
15 LINE CAME UP FOR REVIEW?

16 A ONLY I PRESENT MY STAFF.

17 Q YOUR STAFF. YES, SIR. THAT'S WHAT I INTENDED. SO, YOU
18 PRESENTED ON OCCASIONS WHEN YOUR PHYSICIANS' STAFF MEMBER OR
19 MEMBERS COME UP FOR REVIEW?

20 A YES, SIR.

21 Q OKAY. AND YOU HAVE ALSO, SIR -- HAVE YOU ALSO SERVED AS
22 AN ACTUAL PANEL MEMBER ON PANELS REVIEWING PHYSICIANS IN
23 OTHER SPECIALTIES?

24 A YES, SIR.

25 Q OKAY. ALL RIGHT. NOW, I'M GOING TO SHOW YOU A COUPLE

1 OF THE EXHIBITS THAT WE HAVE ALREADY PUT IN EVIDENCE IN THE
2 CASE. AND I'LL TELL YOU THAT IT'S -- IT'S MY UNDERSTANDING,
3 I THINK WE ALL AGREE -- THAT THESE DOCUMENTS SHOW YOU AS A
4 PANEL MEMBER FOR A SERIES OF REVIEWS. I'M --

5 MR. IRVIN: BEG YOUR PARDON. YOUR HONOR, CAN I
6 APPROACH THE WITNESS?

7 THE COURT: YOU MAY.

8 MR. IRVIN: THANK YOU.

9 BY MR. IRVIN:

10 Q A SERIES OF REVIEWS THAT OCCURRED ON MAY THE 1ST OF 2015
11 AND THESE WOULD BE REVIEWS OF ALL OF THE STAFF
12 ANESTHESIOLOGISTS AT DORN. DR. KENNEDY'S ONE OF THEM. DR.
13 ALGHOTHANI IS ONE OF THEM. AND I BELIEVE THAT SHOWS YOUR
14 NAME AND SIGNATURE AS A PANEL MEMBER THERE; IS THAT RIGHT?

15 A OKAY. YES.

16 Q OKAY. AND THEN HERE'S DR. NGUYEN WHO WAS ALSO AN
17 ANESTHESIOLOGIST AT DORN, AND THERE WAS A PANEL REVIEW DONE
18 ON MAY 1ST OF 2015. AND THAT BEARS YOUR SIGNATURE AS WELL;
19 DOES IT NOT?

20 A YES. YES, SIR.

21 Q OKAY. AND SO YOU WOULD HAVE SAT AS A PANEL MEMBER FOR
22 THESE VARIOUS ANESTHESIOLOGISTS. HERE'S DR. PENDER, MAY THE
23 1ST, 2015, AND THEN AGAIN THERE'S YOUR NAME AND SIGNATURE; IS
24 THAT CORRECT?

25 A YES, SIR.

1 Q AS A PART OF EXHIBIT NUMBER 11. AND THEN HERE IS DR.
2 PRYOR ON MAY THE 1ST. HE'S ALSO AN ANESTHESIOLOGIST. AND
3 THIS IS FOR REVIEW OF HIM. AND AGAIN, THAT'S YOUR NAME
4 PRINTED AND YOUR SIGNATURE?

5 A YES.

6 Q OKAY. ALL RIGHT. AND THEN DR. KENNEDY ON THAT SAME
7 DATE, MAY THE 1ST OF 2015 -- AND I'M LOOKING NOW AT
8 PLAINTIFF'S EXHIBIT 8 WITH YOU. AND HERE'S DR. KENNEDY ON
9 THAT SAME DATE AND THERE AGAIN YOUR NAME PRINTED. AND IS
10 THAT YOUR SIGNATURE?

11 A YES. YES.

12 Q OKAY. DOES THAT -- DO YOU GENERALLY RECALL DOING THE
13 STAFF ANESTHESIOLOGISTS' REVIEWS ON THE -- ON THAT DATE?

14 A I REALLY DON'T RECALL, BUT I WILL -- IT'S THERE
15 DOCUMENTED, I'M THERE.

16 Q OKAY. THAT'S ACTUALLY A GENERAL RECOLLECTION AND ALL
17 THAT TOOK PLACE.

18 A YES.

19 Q OKAY. SO I THINK WE CAN PROBABLY MOVE ON ALONG. DR.
20 AL-ASSAAD, WHEN YOU CONDUCT, WHEN YOU SIT AS A PANEL MEMBER
21 ON ONE OF THESE PAY PANELS OR AS YOU COME AS THE PRESENTER, A
22 SERVICE LINE CHIEF, CHIEF OF PATHOLOGY, IS IT FAIR TO SAY
23 THAT THE PANELS ARE ASKED TO LOOK ONLY AT THE TOTAL PAY OR
24 WHAT IS CALLED THE ANNUAL PAY AND NOT THE SEPARATE COMPONENTS
25 OF BASE PAY AND MARKET PAY?

1 A YES, SIR. WHY WE REALLY -- THAT'S THE ANNUAL PAY TOTAL.

2 Q OKAY. AND IS THAT ALSO THE WAY IN YOUR EXPERIENCE THAT

3 YOU AND OTHER SERVICE LINE CHIEFS PRESENT IT TO THE PANEL?

4 THAT IS, YOU PRESENT AN ANNUAL PAY RECOMMENDATION AND NOT A

5 SEPARATE MARKET PAY OR BASE PAY?

6 A YES, SIR.

7 Q OKAY. NOW, LET ME JUST ASK YOU TO LOOK ONE LAST TIME AT

8 THESE DOCUMENTS THAT I SHOWED YOU THAT YOU SIGNED AS A PANEL

9 MEMBER REVIEWING THE ANESTHESIOLOGISTS ON MAY THE 1ST OF

10 2015. NOW, I'M GOING TO SHOW YOU ON THE SECOND PAGE OF

11 EXHIBIT 8 -- THIS IS THE SECOND PAGE OF THESE COMP PANEL

12 REVIEW FORMS -- AND THERE'S A SECTION ON THE SECOND PAGE AND

13 IT'S CALLED PART C, ACTION BY APPROVING OFFICIAL.

14 DO YOU SEE -- OOPS. DO YOU SEE THAT THERE, DR.

15 AL-ASSAAD? DO YOU SEE THIS SECTION HERE THAT SAYS,

16 COMPENSATION -- I'M SORRY. PART C, ACTION BY APPROVING

17 OFFICIAL?

18 A THAT'S NOT US.

19 Q RIGHT. AND ALL I WANTED TO DO WAS DIRECT YOUR ATTENTION

20 HERE TO WHERE SOMEONE ELSE BESIDES THE PANEL HAS TAKEN THE

21 ANNUAL PAY AND BROKEN IT DOWN INTO ITS COMPONENTS IN -- IN

22 AMOUNTS, BASE PAY AND MARKET PAY. BUT AS YOU SAY, THAT WAS

23 NOT YOU OR--

24 A NO, THAT WAS -- NO. THIS IS AFTER WE DO RECOMMENDATION

25 AND THIS GOES UP AND WE DON'T KNOW WHAT HAPPEN TO IT.

1 Q YES, SIR. AND SO THIS, AS YOU WOULD UNDERSTAND IT,
2 WOULD BE DONE LATER BY WHOEVER THE APPROVING OFFICIAL IS
3 WHOSE SIGNATURE IS DOWN HERE ON THE BOTTOM?

4 A YEAH. YOU'RE DOING -- I THINK -- I'M NOT SURE. YOU'RE
5 DOING ANYTHING -- FINAL DECISION IS THAT...

6 Q OKAY. AND SO WHERE THESE BASE PAY AND MARKET PAY
7 AMOUNTS ARE BROKEN OUT SEPARATELY, THAT'S NOT SOMETHING IN
8 YOUR EXPERIENCE THE PANEL DOES.

9 A NO, WE DON'T.

10 Q OKAY. NOW, IF WE CAN ACCEPT THESE NUMBERS ON THESE
11 FORMS AS BEING TRUE, HOW MUCH IS -- IF YOU CAN READ IT, HOW
12 MUCH IS THE MARKET PAY AMOUNT FOR DR. KENNEDY ON THIS
13 PARTICULAR DATE? CAN YOU READ THAT NUMBER FOR ME?

14 A 167,770.

15 Q ALL RIGHT. NOW, LET'S LOOK AT DR. ALGHOTHANI ON THAT
16 SAME DATE AND TELL ME IF YOU CAN READ THE NUMBER THAT'S
17 WRITTEN THERE FOR HIS AMOUNT OF MARKET PAY.

18 A 189,533.

19 Q THANK YOU. NOW, IF YOU WOULD TAKE A LOOK, PLEASE, AT
20 THE SECOND PAGE OF DR. NGUYEN'S REVIEW ON THAT SAME DATE.
21 WHAT IS THE AMOUNT OF MARKET PAY AWARDED TO DR. NGUYEN?

22 A 190,513.

23 Q OKAY. AND LOOK AT DR. BRADLEY'S REVIEW WITH ME ON THAT
24 SAME DATE AND TELL ME THE AMOUNT OF HIS MARKET PAY.

25 A 187,246.

1 Q THANK YOU. AND FINALLY, DR. PRYOR ON THAT DATE. AND
2 HOW MUCH WAS THE AWARD OF MARKET PAY TO DR. PRYOR?

3 A 176,911.

4 MR. IRVIN: YOUR HONOR'S INDULGENCE JUST FOR A
5 MOMENT.

6 Q DR. AL-ASSAAD, THANK YOU VERY MUCH AND PLEASE ANSWER ANY
7 QUESTIONS THAT COUNSEL FOR THE VA MIGHT HAVE FOR YOU.

8 A OKAY.

9 CROSS-EXAMINATION

10 BY MR. ANDREWS:

11 Q GOOD MORNING, MR. AL-ASSAAD. HOW ARE YOU TODAY?

12 A GOOD MORNING.

13 Q THANK YOU FOR COMING BACK TO THE COURTHOUSE TODAY. I
14 APPRECIATE YOU BEING HERE. NOW, YOU WERE JUST ASKED AND I
15 BELIEVE YOU TESTIFIED THAT YOU HAVE SERVED ON COMPENSATION
16 PANELS MANY TIMES; IS THAT CORRECT?

17 A YES, SEVERAL TIME.

18 Q OKAY. DO YOU HAVE ANY IDEA APPROXIMATELY HOW MANY
19 TIMES?

20 A NOT TO--

21 Q BE HARD TO PUT A NUMBER ON IT?

22 A I DOUBT IF I CAN RECALL HOW MANY.

23 Q I'M SORRY?

24 A I DOUBT -- I CANNOT RECALL HOW MANY.

25 Q OKAY.

1 A I HAVE BEEN.

2 Q WELL, LET ME ASK YOU THIS. YOU HAVE SERVED ON
3 COMPENSATION PANELS FOR ANESTHESIOLOGISTS; IS THAT CORRECT?

4 A YES.

5 Q HAVE YOU SERVED ON COMPENSATION PANELS FOR DOCTORS IN
6 OTHER SPECIALTIES?

7 A YES.

8 Q COULD YOU NAME SOME OF THOSE SPECIALTIES?

9 A MEDICINE, PSYCHIATRY --

10 COURT REPORTER: I'M SORRY?

11 A -- PSYCHIATRY. SURGERY. THAT'S BASICALLY MOST OF THE
12 SPECIALTY IN THE HOSPITAL.

13 Q IS THE -- IS THE PROCESS YOU FOLLOW IN THOSE PAY PANELS
14 GENERALLY THE SAME?

15 A THE SAME.

16 Q OKAY. NOW, YOU HAVE TESTIFIED THAT ON THE PAY PANELS,
17 YOUR JOB IS TO RECOMMEND ANNUAL PAY; IS THAT CORRECT?

18 A RECOMMEND THE PAY.

19 Q TO RECOMMEND ANNUAL PAY.

20 A ANNUAL PAY.

21 Q RIGHT. SAID THE BASE PAY PLUS THE MARKET PAY, THE
22 ANNUAL PAY.

23 A YES, SIR.

24 Q BUT YOU DON'T DETERMINE THE BASE PAY; IS THAT CORRECT?

25 A NO.

1 Q THAT'S DONE BY HR.

2 A THAT'S NOT...

3 Q SO IS IT FAIR TO SAY THAT THE MARKET PAY IS THE ONLY
4 VARIABLE COMPONENT OF THE ANNUAL PAY; CORRECT?

5 A APPARENTLY. WE DON'T KNOW. I MEAN, WE ARE ONLY CONCERN
6 ABOUT THE ANNUAL PAY.

7 Q RIGHT. THAT'S RIGHT.

8 A YEAH.

9 Q BUT THE BASE PAY IS NON-DISCRETIONARY. HR DETERMINES
10 THAT; CORRECT?

11 A EXACTLY. DEPENDS ON HOW LONG THE PERSON THAT'S -- WE
12 DON'T DECIDE THAT.

13 Q YOU DON'T GET INVOLVED WITH THAT.

14 A NO.

15 Q OKAY. BUT AS YOU SET ANNUAL PAY HIGHER OR LOWER, THAT
16 MARKET PAY NUMBER WILL GO UP OR DOWN; IS THAT CORRECT?

17 A WE DON'T LOOK AT THE MARKET PAY, I MEAN, INDIVIDUALLY.

18 Q RIGHT.

19 A WE LOOK AT THE TOTAL ANNUAL PAY.

20 Q YOU'RE LOOKING AT THE ANNUAL PAY ON A DOCTOR-BY-DOCTOR
21 BASIS.

22 A YES. AND THAT'S WHAT WE TRY TO MAKE SWITCHABLE TO
23 EVERYBODY ELSE--

24 Q SURE. RIGHT. WELL, LET'S TALK ABOUT THE FACTORS THAT
25 YOU MIGHT CONSIDER IN THE COURSE OF THAT PROCESS. CAN YOU

1 PULL UP PLAINTIFF'S EXHIBIT 8 ON THE FIRST PAGE? RIGHT IN
2 THE MIDDLE.

3 SO DR. AL-ASSAAD, I BELIEVE YOU WERE PRESENTED WITH THIS
4 DOCUMENT BY MR. IRVIN. DO YOU SEE RIGHT HERE THESE FACTORS
5 IN THE MIDDLE OF THE PAGE?

6 A I DON'T SEE THE FACTOR REALLY.

7 Q HOW ABOUT PANEL FINDINGS?

8 A OKAY. I SEE --

9 Q RIGHT HERE.

10 A -- I SEE. OKAY.

11 Q DO THOSE LOOK FAMILIAR TO YOU?

12 A YEP.

13 Q IS THAT THE TYPE OF INFORMATION YOU WOULD TAKE INTO
14 CONSIDERATION IN A COMPENSATION PANEL?

15 A YES.

16 Q OKAY. LET'S LOOK AT -- IF WE COULD GO TO PAGE TWO OF
17 THIS DOCUMENT, PLEASE. IF YOU COULD SCROLL DOWN TO THAT PART
18 C. THANK YOU. NOW DR. AL-ASSAAD, YOU WERE JUST ASKED ABOUT
19 THESE NUMBERS HERE AND THE ANNUAL PAY. DO YOU SEE THAT?

20 A YES, SIR.

21 Q AND ABOUT THE BASE PAY PLUS MARKET PAY EQUALS ANNUAL
22 PAY? AND YOU WERE ASKED I BELIEVE SPECIFICALLY ABOUT THE
23 MARKET PAY.

24 A I BEEN ASKED TO READ THE MARKET PAY ONLY.

25 Q THAT'S RIGHT. YOU WERE ASKED TO READ THAT NUMBER.

1 COULD YOU READ US THE FINAL ANNUAL PAY NUMBER?

2 A 294,351.

3 Q OKAY. NOW, IN -- AND YOU WERE ON THIS PARTICULAR PANEL;
4 IS THAT CORRECT?

5 A MY SIGNATURE IS THERE.

6 Q YOUR SIGNATURE IS THERE. DO YOU THINK --

7 A YES, SIR.

8 Q -- THAT YOU SIGNED THIS DOCUMENT?

9 A I SIGNED THIS.

10 Q OKAY. NOW, IF YOU SIGNED THIS DOCUMENT AND THAT IS THE
11 NUMBER OF ANNUAL PAY, THAT'S THE AMOUNT OF ANNUAL PAY, IS
12 THAT YOUR RECOMMENDATION OF ANNUAL PAY?

13 A THAT'S -- THAT'S WHAT RECOMMEND.

14 Q RIGHT. IF YOU HAD BEEN PRESENTED WITH ANY EVIDENCE THAT
15 THE ANNUAL PAY NUMBER SHOULD BE HIGHER, WOULD YOU HAVE
16 SUGGESTED TO THE CHIEF THAT IT SHOULD BE HIGHER?

17 A I -- USUALLY WE ARE FOLLOW THE GUIDE, GUIDELINE.

18 Q YOU'RE FOLLOWING THE GUIDELINES.

19 A RIGHT.

20 Q RIGHT. BUT IF THERE WERE EVIDENCE, MARKET-BASED
21 EVIDENCE OR EXPERIENCE-RELATED EVIDENCE THAT--

22 A THAT WILL AFFECT LITTLE BIT HERE AND THERE, YEAH.

23 Q I'M SORRY, SIR? COULD YOU REPEAT--

24 A NOT A MAJOR FACTOR AFFECT THE ANNUAL.

25 Q UH-HUH.

1 A IT WILL AFFECT LITTLE BIT, THOUGH, BUT NOT VERY.

2 Q OKAY. I GUESS WHAT I'M TRYING TO ASK IS IF THERE HAD --
3 IF THE CHIEF HAD BROUGHT EVIDENCE AND YOU HAD CONSIDERED
4 EVIDENCE THAT MAYBE A DOCTOR WAS ENTITLED TO MORE MONEY,
5 WOULD THAT HAVE COME UP IN THE COURSE OF YOUR DISCUSSION AT
6 THE COMPENSATION PANEL?

7 A THAT WOULD COME UP LITTLE BIT, YES.

8 Q ALL RIGHT. CAN WE GO TO EXHIBIT 11, PLEASE, PAGE TWO.
9 OKAY. NOW, THIS IS ANOTHER ONE OF THE RATES OF PAY I BELIEVE
10 YOU WERE ASKED TO READ. THIS IS FOR DR. ALGHOTHANI AND THIS
11 IS PLAINTIFF'S EXHIBIT 11 PAGE TWO. DO YOU SEE THOSE FIGURES
12 THERE?

13 A YES, SIR.

14 Q CAN YOU READ US THE ANNUAL PAY NUMBER?

15 A 289,490.

16 Q AND DO YOU SEE YOUR SIGNATURE AGAIN ABOVE THAT NUMBER?

17 A YES, SIR.

18 Q AND IS THAT A NUMBER THAT YOU WOULD HAVE RECOMMENDED AS
19 ANNUAL PAY?

20 A THAT WAS I THINK RECOMMENDED FOR ANNUAL PAY.

21 Q AND WOULD YOU HAVE RECOMMENDED A NUMBER FOR ANNUAL PAY
22 YOU DID NOT THINK WAS FAIR?

23 A I THINK -- I WOULD NOT RECOMMEND SOMETHING NOT FAIR.

24 Q YOU WOULD NOT RECOMMEND SOMETHING THAT'S NOT FAIR. IS
25 THAT -- IS THAT CORRECT?

1 A THAT'S CORRECT.

2 Q OKAY. THANK YOU. CAN WE GO FORWARD I BELIEVE -- NOW,
3 THIS IS THE COMPENSATION PAY PANEL FOR DR. NGUYEN. AND
4 AGAIN, IS THAT YOUR SIGNATURE HERE ON THIS DOCUMENT?

5 A YES, SIR.

6 Q AND COULD YOU READ US THE ANNUAL PAY RECOMMENDATION
7 HERE?

8 A 290,470.

9 Q AND AGAIN, IS THAT THE ANNUAL PAY NUMBER THAT YOU
10 RECOMMENDED?

11 A YES, SIR.

12 Q AND WOULD YOU HAVE RECOMMENDED A ANNUAL PAY NUMBER YOU
13 DID NOT THINK WAS FAIR?

14 A NO.

15 Q OKAY.

16 A NO, SIR.

17 Q LET'S GO FORWARD TO DR. PENDER. AND DR. AL-ASSAAD, I'M
18 GOING TO ASK YOU THE SAME QUESTION. IS THAT YOUR SIGNATURE
19 ON THIS PAGE?

20 A YES, SIR.

21 Q AND COULD YOU READ US THE ANNUAL PAY NUMBER, PLEASE?

22 A YES, SIR, 290,535.

23 Q AND IS THAT THE ANNUAL PAY NUMBER YOU RECOMMENDED?

24 A YES, SIR.

25 Q AND YOU WOULD NOT HAVE RECOMMENDED A NUMBER YOU DID NOT

1 THINK WAS FAIR; CORRECT?

2 A NO, SIR.

3 Q LET'S GO FORWARD TO DR. PRYOR. AND AGAIN, DR.

4 AL-ASSAAD, IS THAT YOUR SIGNATURE?

5 A YES, SIR.

6 Q AND COULD YOU READ US THAT ANNUAL PAY NUMBER?

7 A YES, SIR. 293,528.

8 Q AND IS THAT YOUR RECOMMENDATION OF ANNUAL PAY?

9 A YES, SIR.

10 Q AND YOU WOULD NOT HAVE RECOMMENDED A NUMBER FOR ANNUAL
11 PAY YOU DID NOT AGREE WITH?

12 A NO, SIR.

13 Q AND YOU DID NOT THINK WAS FAIR?

14 A THINK IS FAIR.

15 Q OKAY. THANK YOU.

16 MR. ANDREWS: THAT'S ALL I HAVE, YOUR HONOR.

17 THE COURT: ANY OTHER QUESTIONS?

18 MR. IRVIN: YES, MA'AM, JUST A COUPLE.

19 REDIRECT EXAMINATION

20 BY MR. IRVIN:

21 Q DR. AL-ASSAAD, JUST WANTED TO MAKE SURE THAT I HEARD YOU
22 CORRECTLY. DID YOU SAY THAT USUALLY THE PANEL WILL GO ALONG
23 WITH THE RECOMMENDATION THAT THE SERVICE LINE CHIEF IS MAKING
24 ON ANNUAL PAY?

25 A MOST OF THE TIME IS VERY CLOSE AND THERE ARE SOME LITTLE

1 ITEMS FROM -- MAYBE NEED LITTLE ADJUSTMENT AND USUALLY IT'S
2 NOT MAJOR. IT DEPENDS SOMETIMES IF THERE IS LIKE ACADEMIC
3 TITLE OR A DIFFERENT ACADEMIC TITLE, MIGHT USE COUPLE OF
4 THOUSAND, FOR EXAMPLE. BUT I MEAN, IT'S NOT A MAJOR
5 ADJUSTMENT.

6 BUT ARE -- WE TRY TO GO WITH ACADEMIC SORT OF NUMBER,
7 THE PROFESSOR SUCH BEEN PROFESSOR FOR SOME TIME AND ASSISTANT
8 PROFESSOR, AND SOMEBODY THAT SOMETHING UNUSUAL, BETTER OR --
9 OR OTHER WAY AROUND, NOT BETTER, AND THAT WILL AFFECT THE
10 ADJUSTMENT LITTLE BIT. AND THERE WILL BE DISCUSSION AND
11 AGAIN THERE WILL BE VOTING AFTER THAT AND THEY'RE
12 RECOMMENDATION A HIGHER LEVEL.

13 Q THANK YOU. ONE LAST QUESTION. ON EXHIBIT 8 -- AND
14 THESE ARE THE ONES THAT WE LOOKED AT THAT ARE DR. KENNEDY'S
15 REVIEWS. AND HERE, HERE IS THIS ONE DATED MAY THE 1ST OF
16 2015 THAT HAS THE PANEL MEMBERS AND THEIR SIGNATURES AND THEN
17 THE AMOUNTS DOWN HERE ON THIS SECOND PAGE.

18 AND WHAT I WANTED TO ASK YOU ABOUT IS THE THIRD PAGE OF
19 THIS MAY 1, 2015 REVIEW. AND IT'S A TYPED-UP PAGE AND IT'S
20 GOT NUMBERS ONE THROUGH SEVEN, INFORMATION ON ONE THROUGH
21 SEVEN, AND THEN IT LOOKS LIKE EIGHT IS NOT APPLICABLE. BUT
22 MY QUESTION IS, ARE THESE SHEETS FAMILIAR TO YOU?

23 A YEAH. EVERYBODY HAS TO -- I MEAN, THAT'S REQUIREMENT TO
24 FILL OUT THOSE SEVEN ITEMS.

25 Q ALL RIGHT, SIR.

1 A YEAH.

2 Q AND DO YOU RECALL WHEN THAT REQUIREMENT STARTED?

3 A I REALLY DON'T RECALL WHEN IT STARTED. I MEAN, IN THE
4 WHOLE, THE WHOLE...

5 Q IF YOU'D LOOK WITH ME AT THE PRIOR YEAR FOR DR. KENNEDY
6 OR REVIEW ON FEBRUARY THE 26TH OF 2014, THAT SHEET IS NOT A
7 PART OF THAT REVIEW. DO YOU SEE THAT?

8 A YEAH. OF COURSE, I -- I REALLY DON'T RECALL WHEN THEY
9 START REQUIRING THIS SEVEN ITEMS. THAT'S THE -- THE RULES
10 AND WE FOLLOW THE RULES AND...

11 Q YES.

12 A OKAY. AND THAT -- YEAH, SO EVERYBODY -- EVERY CHIEF HAS
13 TO SUBMIT THOSE THINGS AND...

14 Q OKAY.

15 A THAT...

16 Q THANK YOU VERY MUCH, DR. AL-ASSAAD.

17 A THANK YOU.

18 MR. ANDREWS: I DON'T HAVE ANY FURTHER QUESTIONS,
19 YOUR HONOR.

20 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. YOU
21 CAN STEP DOWN. YOU'RE EXCUSED.

22 THE WITNESS: THANK YOU.

23 (WITNESS LEFT THE STAND.)

24 DR. NOAH DOWNIE, AFTER BEING DULY SWORN,
25 TESTIFIED AS FOLLOWS:

1 DIRECT EXAMINATION

2 BY MR. IRVIN:

3 Q GOOD MORNING, DR. DOWNIE.

4 A GOOD MORNING.

5 Q I'M WILMOT IRVIN AND WE MET AT YOUR DEPOSITION. DO YOU
6 REMEMBER GIVING YOUR DEPOSITION IN THE CASE?

7 A YES.

8 Q OKAY. JUST TO GIVE A LITTLE CONTEXT TO WHO YOU ARE AND
9 WHY YOU'RE HERE, AS I UNDERSTAND IT YOU ARE A PSYCHIATRIST
10 AND YOU PRACTICE AT THE DORN VA MEDICAL CENTER HERE IN
11 COLUMBIA; IS THAT CORRECT?

12 A YES.

13 Q OKAY. AND YOU BEGAN YOUR WORK AT DORN ON JUNE 30TH OF
14 2013; IS THAT ACCURATE?

15 A YES.

16 Q OKAY. AND SO, OVER THE PERIOD OF I GUESS ROUGHLY NOW
17 FIVE YEARS OR A LITTLE MORE, YOU HAVE HAD OCCASION TO SERVE
18 ON THESE PHYSICIAN COMPENSATION PANELS WHERE THE PHYSICIANS'
19 SALARIES ARE REVIEWED?

20 A YES.

21 Q YOU SERVED ON THOSE PANELS.

22 A YES.

23 Q OKAY. ALL RIGHT. AND AS I RECALL, YOU SERVED ON THE
24 PANEL THAT REVIEWED DR. KENNEDY AND THE OTHER FOUR STAFF
25 ANESTHESIOLOGISTS ON MAY THE 1ST OF 2015. DO YOU -- DO YOU

1 REMEMBER THAT?

2 A YES.

3 Q OKAY. I HAVE GOT HERE IN FRONT OF YOU THOSE MAY 1ST,
4 2015 REVIEWS. AND IF YOU EVER WANT TO LOOK AT THEM WHILE WE
5 ARE TALKING, FEEL FREE TO. BUT THIS ONE, EXHIBIT 11, IS A
6 COLLECTION OF THE FOUR STAFF ANESTHESIOLOGISTS BESIDES DR.
7 KENNEDY. AND THEN WE PUT DR. KENNEDY'S IN A SEPARATE
8 EXHIBIT, NUMBER 8, ALONG WITH HIS OTHER REVIEWS OVER THE
9 COURSE OF TIME.

10 SO, THERE'S DR. KENNEDY ON MAY 1ST. HERE ARE THE OTHER
11 FOUR STAFF ANESTHESIOLOGISTS ON MAY THE 1ST OF 2015. AND YOU
12 CAN -- IF YOU WANT, IF YOU WANT TO TAKE A MOMENT JUST TO
13 CONFIRM THAT YOU PRINTED YOUR NAME AND SIGNED YOUR NAME TO
14 THESE REVIEWS THAT WERE ON THAT DATE. IS THAT YOUR
15 SIGNATURE?

16 A YES.

17 Q OKAY. ALL RIGHT, SIR. NOW ON THIS DATE, MAY 1ST OF
18 2013 -- OF 2015 WHEN YOU SERVED ON THESE PANEL -- THIS PANEL
19 THAT REVIEWED THE FIVE STAFF ANESTHESIOLOGISTS, I BELIEVE
20 THAT YOU TOLD ME THAT THOSE FIVE PHYSICIANS, THOSE
21 ANESTHESIOLOGISTS, WERE REVIEWED ONE BY ONE, THAT IS
22 SEQUENTIALLY, AND NOT THEY WERE ALL REVIEWED AT THE SAME
23 TIME. IS THAT YOUR RECOLLECTION?

24 A YES.

25 Q ALL RIGHT. AND YOU TOLD ME THAT THE -- THAT YOU

1 RECALLED THAT THOSE FIVE SEQUENTIAL REVIEWS TOOK SOMEWHERE IN
2 THE RANGE OF 45 MINUTES TO AN HOUR TO GET ALL OF THOSE DONE.
3 IS THAT A FAIR STATEMENT?

4 A YES.

5 Q OKAY. ALL RIGHT. SO YOU GOT THE FIVE DONE, YOU DID
6 THEM SEQUENTIALLY ONE AFTER THE OTHER AND IT TOOK ABOUT AN
7 HOUR, 45 MINUTES TO AN HOUR, TO ACCOMPLISH THOSE FIVE; IS
8 THAT CORRECT?

9 A YES.

10 Q ALL RIGHT. NOW, BEFORE YOU BEGAN YOUR SERVICE ON THESE
11 PANELS, DID YOU RECEIVE ANY TRAINING FROM DORN VA ABOUT WHAT
12 YOU SHOULD DO AS A PANEL MEMBER?

13 A NO.

14 Q ALL RIGHT. OR -- OR HOW YOU WERE TO GO ABOUT THIS PANEL
15 PROCESS OF ARRIVING AT THE ANNUAL PAY FOR A PHYSICIAN?

16 A NOT THAT I RECALL.

17 Q ALL RIGHT. AND I BELIEVE YOU SAID THAT THE FIRST TIME
18 YOU EVER REVIEWED THE VA HANDBOOK, WHICH IS EXHIBIT NUMBER 1,
19 PLAINTIFF'S EXHIBIT NUMBER 1 -- AND I'M SHOWING YOU THAT
20 NOW -- THE FIRST TIME THAT YOU EVER REVIEWED THE HANDBOOK
21 WOULD HAVE BEEN ON THE DAY THAT I TOOK YOUR DEPOSITION. IS
22 THAT A CORRECT STATEMENT?

23 A YES.

24 Q ALL RIGHT, SIR. NOW, AS I UNDERSTAND IT FROM YOUR
25 EXPERIENCE, THE PANEL THAT IS CONSIDERING A PARTICULAR

1 PHYSICIAN IN YOUR EXPERIENCE IS LOOKING AT THE TOTAL ANNUAL
2 PAY NUMBER AND NOT FOCUSING ON THE DISCRETE BASE PAY OR
3 MARKET PAY COMPONENTS THAT MAKE UP THAT ANNUAL PAY. IS THAT
4 YOUR UNDERSTANDING?

5 A YES.

6 Q OKAY. WAS IT YOUR UNDERSTANDING FROM THE PRESENTATION
7 THAT WOULD HAVE BEEN MADE BY DR. MILLER ON THE DATE MAY 1,
8 2015, ON THE DATE OF THESE STAFF ANESTHESIOLOGISTS' REVIEWS,
9 THAT THE OBJECTIVE WAS TO TRY TO KEEP ALL OF THE
10 ANESTHESIOLOGISTS' TOTAL PAY PRETTY CLOSE?

11 A I DON'T KNOW.

12 Q YOU DON'T REMEMBER?

13 A I MEAN, I DON'T KNOW WHAT HIS MOTIVATION WAS.

14 Q OKAY. LET ME SHOW YOU YOUR TRANSCRIPT FROM YOUR
15 DEPOSITION. AND THE CLERK HAS NOW UNSEALED THE ORIGINAL AND
16 I'LL HAND THAT TO YOU NOW. DO -- YOU RECALL GIVING THAT
17 TESTIMONY; CORRECT?

18 A YES.

19 Q OKAY. AND YOU UNDERSTOOD WHEN YOU GAVE IT THAT YOU WERE
20 GIVING THAT TESTIMONY UNDER YOUR OATH TO TELL THE TRUTH?

21 A YES.

22 Q AND YOU ATTEMPTED TO DO THAT TO THE BEST OF YOUR
23 ABILITY, THAT IS, TELL THE TRUTH?

24 A YES.

25 Q OKAY. ALL RIGHT, SIR. AND LET ME DIRECT YOUR

1 ATTENTION, IF I CAN, TO PAGE 23 OF YOUR DEPOSITION
2 TRANSCRIPT. AND LET ME KNOW WHEN YOU HAVE FOUND THAT.

3 A I HAVE FOUND IT.

4 Q OKAY. AND MY QUESTION TO YOU BEGINNING ON LINE 13 WAS,
5 WAS IT YOUR UNDERSTANDING IN SERVING ON THESE PANELS OR ON
6 THIS PARTICULAR PANEL THAT THE OBJECTIVE WAS TO KEEP THE
7 ANESTHESIOLOGISTS' PAY ESSENTIALLY PRETTY CLOSE, PRETTY
8 UNIFORMLY CLOSE IN AMOUNT?

9 AND READ YOUR ANSWER THAT YOU GAVE ON THAT DATE, SIR.

10 A I MEAN, THAT WAS MY UNDERSTANDING AS TO WHAT THE CHIEF
11 OR CHAIRPERSON WAS ASKING FOR.

12 MR. ANDREWS: YOUR HONOR, OBJECTION. THIS QUESTION
13 CALLS FOR SPECULATION. IT WAS -- I KNOW IT'S BEING READ FROM
14 HIS DEPOSITION TRANSCRIPT, IT WAS ENTERED INTO EVIDENCE. IT
15 STILL HAS TO NOT BE SPECULATIVE.

16 MR. IRVIN: YOUR HONOR--

17 THE COURT: I THINK HE'S USING THE TRANSCRIPT TO
18 REFRESH HIS MEMORY OR EITHER TO IMPEACH, SO IF HE SAID
19 SOMETHING DIFFERENT DURING HIS DEPOSITION THAN HE'S
20 TESTIFYING TO AT TRIAL, THEN HE CAN USE IT.

21 MR. IRVIN: THANK YOU VERY MUCH, YOUR HONOR. AND
22 THOSE ARE ALL THE QUESTIONS THAT WE HAVE FOR DR. DOWNIE.
23 BY MR. IRVIN:

24 Q PLEASE ANSWER ANY QUESTIONS THAT MR. ANDREWS MIGHT HAVE,
25 SIR.

1 A OKAY.

2 CROSS-EXAMINATION

3 BY MR. ANDREWS:

4 Q GOOD MORNING, DR. DOWNIE.

5 A GOOD MORNING.

6 Q THANK YOU FOR BEING WITH US THIS MORNING.

7 A YOU'RE WELCOME.

8 Q DR. DOWNIE, YOU TESTIFIED THAT YOU HAVE SERVED ON
9 COMPENSATION PANELS DURING YOUR TIME AT THE VA; IS THAT
10 CORRECT?

11 A YES.

12 Q WE KNOW THAT YOU SERVED ON DR. KENNEDY'S PANEL, FOR
13 INSTANCE; IS THAT CORRECT?

14 A YES.

15 Q AND THE PANELS OF OTHER ANESTHESIOLOGISTS, I BELIEVE?

16 A I BELIEVE THIS IS THE ONLY PANEL THAT WAS COMPRISED OF
17 ANESTHESIOLOGISTS.

18 Q OKAY. HAVE YOU SERVED ON A PANEL FOR DOCTORS IN OTHER
19 SPECIALTIES?

20 A YES.

21 Q COULD YOU NAME FOR US SOME OF THOSE SPECIALTIES?

22 A PHYSICAL MEDICINE AND REHAB, I BELIEVE INTERNAL
23 MEDICINE. THAT'S ALL THAT I RECALL.

24 Q OKAY.

25 A I HAVE ONLY DONE FOUR, MAYBE, PANELS.

1 Q OKAY. ALL RIGHT. HAVE THERE BEEN ANY NOTICEABLE
2 DIFFERENCES IN THE WAY THESE COMPENSATION PANELS OPERATE
3 ACROSS SPECIALTIES?

4 A NO.

5 Q OKAY. LET'S LOOK AT PLAINTIFF'S EXHIBIT 8. IF WE CAN
6 GO TO PAGE TWO OF THIS DOCUMENT. AND DR. DOWNIE, IS THAT
7 YOUR NAME AND SIGNATURE RIGHT THERE?

8 A YES.

9 Q AND THIS IS FOR DR. KENNEDY'S COMPENSATION PANEL. DO
10 YOU REMEMBER SERVING ON THIS PANEL?

11 A YES.

12 Q DO YOU SEE THE ANNUAL PAY NUMBER DOWN THERE BELOW YOUR
13 SIGNATURE?

14 A YES.

15 Q COULD YOU READ THAT FOR US?

16 A 294,351.

17 Q WOULD THAT HAVE BEEN THE ANNUAL PAY NUMBER THAT YOU
18 RECOMMENDED TO THE APPROVING OFFICIAL?

19 A YES.

20 Q DO YOU BELIEVE THAT'S A FAIR NUMBER?

21 A YES.

22 Q WOULD YOU HAVE APPROVED A NUMBER YOU DIDN'T THINK WAS
23 FAIR?

24 A NO.

25 Q CAN WE TURN TO THE NEXT PAGE, PLEASE. AND IF YOU COULD

1 ZOOM OUT A LITTLE BIT SO THAT WE CAN SEE THE WHOLE PAGE.

2 JUST WANT TO... DOES THIS PAGE LOOK FAMILIAR TO YOU? HAVE
3 YOU SEEN THIS PAGE BEFORE?

4 A YES, I BELIEVE I HAVE.

5 Q OKAY. AND WHAT DO YOU RECOGNIZE IT TO BE?

6 A I RECOGNIZE IT AS LISTING THE SPECIFIC INFORMATION
7 PERTAINING TO THE PERSON THAT'S BEING REVIEWED BY THE PAY
8 PANEL.

9 Q OKAY.

10 A THE VARIOUS COMPONENTS THAT GO INTO PAY RECOMMENDATIONS.

11 Q RIGHT. AND SO THIS IS FOR DR. KENNEDY; CORRECT?

12 A APPEARS TO BE, YES.

13 Q AND ARE YOU FAMILIAR WITH -- IT'S SOMETIMES REFERRED TO
14 AS THE SEVEN FACTORS?

15 A YES.

16 Q SO, FOR INSTANCE, EXPERIENCE IN THE SPECIALTY?

17 A YES.

18 Q THE NEED FOR SPECIALTY ASSIGNMENT AT THE FACILITY?

19 A YES.

20 Q OKAY. LET'S WALK THROUGH THESE PARAGRAPHS. THIS FIRST
21 PARAGRAPH -- WE'LL DO IT ONE AT A TIME. DOES THIS FIRST
22 PARAGRAPH LOOK TO YOU LIKE IT RELATES TO DR. KENNEDY'S LEVEL
23 OF EXPERIENCE IN THE FIELD OF ANESTHESIOLOGY?

24 A YES.

25 Q AND THE SECOND PARAGRAPH, DOES THAT APPEAR TO YOU THAT

1 IT'S DISCUSSING THE NEED FOR THE SPECIALTY OR ASSIGNMENT AT
2 THE FACILITY?

3 A YES.

4 Q AND THE THIRD, DOES THAT LOOK LIKE IT'S REFERRING TO THE
5 RELEVANT HEALTHCARE LABOR MARKET?

6 A YES.

7 Q AND THE FOURTH, DOES THAT REFER TO DR. KENNEDY'S BOARD
8 CERTIFICATIONS?

9 A YES.

10 Q AND THE FIFTH, DOES THAT REFER TO ACCOMPLISHMENTS IN THE
11 FIELD OF ANESTHESIOLOGY?

12 A YES.

13 Q OKAY. AND THE SIXTH, DOES THAT REFER TO DR. KENNEDY'S
14 VA EXPERIENCE?

15 A YES.

16 Q OKAY. AND THE SEVENTH IS A CATCH-ALL FOR OTHER
17 CONSIDERATIONS. DOES THIS LOOK LIKE PERHAPS INDIVIDUAL,
18 UNIQUE INFORMATION YOU WOULD TAKE INTO ACCOUNT IN CONSIDERING
19 ANNUAL PAY?

20 A YES.

21 Q OKAY. DR. DOWNIE, WHEN YOU SERVED ON THESE PANELS --
22 AND I KNOW YOU'VE SERVED ON FOUR -- BUT HAVE YOU TAKEN YOUR
23 ROLE SERIOUSLY?

24 A YES.

25 Q DO YOU CONSIDER THE INFORMATION THAT'S PUT BEFORE YOU?

1 A YES.

2 Q AND DO YOU TRY TO GET TO A FAIR RESULT FOR EVERY DOCTOR
3 YOU CONSIDER?

4 A YES.

5 MR. ANDREWS: I DON'T HAVE ANY FURTHER QUESTIONS,
6 YOUR HONOR. THANK YOU.

7 THE COURT: ANYTHING ELSE?

8 MR. IRVIN: WE DON'T HAVE ANY FURTHER QUESTIONS FOR
9 DR. DOWNIE.

10 THE COURT: I HAVE A COUPLE OF QUESTIONS. IF YOU
11 COULD PUT THAT BACK UP ON THE SCREEN AGAIN, PLEASE.

12 MR. ANDREWS: WHICH PARTICULAR PAGE?

13 THE COURT: DR. KENNEDY'S SEVEN FACTORS. ALL
14 RIGHT.

15 DR. DOWNIE, DID YOU PREPARE THESE SEVEN FACTORS? DO YOU
16 KNOW HOW THEY CAME TO BE ARTICULATED THIS WAY?

17 THE WITNESS: I DON'T.

18 THE COURT: OKAY.

19 THE WITNESS: I DIDN'T.

20 THE COURT: DID YOUR GROUP, YOUR COMMITTEE, DISCUSS
21 THE SEVEN FACTORS AS TO WHAT WOULD BE PUT ON THIS FORM? DID
22 YOUR GROUP SAY, FOR EXAMPLE, THE REASON WE ARE RECOMMENDING
23 THIS PAY IS BECAUSE DR. KENNEDY HAS OVER 20 YEARS OF
24 EXPERIENCE AND THERE'S A NEED TO RETAIN THE SPECIALTY? DID
25 YOU ALL GO THROUGH THESE?

1 THE WITNESS: WE WENT THROUGH THESE. DR. MILLER
2 PRESENTED THESE VARIOUS FACTORS AS A BASIS FOR HIS
3 RECOMMENDATION FOR THE ANNUAL PAY TO THAT.

4 THE COURT: SO YOU TOOK A LOOK AT THESE FACTORS --

5 THE WITNESS: YES.

6 THE COURT: -- AS HE PRESENTED?

7 THE WITNESS: YES.

8 THE COURT: AND THEN YOU CAME UP WITH YOUR
9 RECOMMENDATION?

10 THE WITNESS: YES.

11 THE COURT: SO AT THE TIME YOU CONSIDERED DR.
12 KENNEDY'S RECOMMENDATION FOR MARKET PAY AND ANNUAL PAY, DID
13 YOU ALSO LOOK AT THE OTHER DOCTORS AND COMPARE THEM TO HIM OR
14 DID YOU DO THEM ONE AT A TIME?

15 THE WITNESS: ONE AT A TIME.

16 THE COURT: SO YOU DIDN'T SAY, FOR EXAMPLE, IF YOU
17 LOOK AT DR. KENNEDY AND HE HAS 20 YEARS AND DR -- ANOTHER
18 DOCTOR ONLY HAS FIVE YEARS, THEN DR. KENNEDY SHOULD MAKE MORE
19 MONEY THAN THE PERSON? YOU DIDN'T DO THAT?

20 THE WITNESS: WE DIDN'T COMPARE BETWEEN -- BETWEEN
21 INDIVIDUALS.

22 THE COURT: ALL RIGHT. SO IF THIS WAS YOUR
23 RECOMMENDATION FOR DR. KENNEDY AND THIS IS THE REASON YOU
24 SUGGEST THAT DR. KENNEDY SHOULD RECEIVE THE SALARY THAT HE
25 RECEIVED, IF YOU GO TO EXHIBIT 11 AND PULL UP DR.

1 ALGHOTHANI'S REPORT, DID YOU ALSO DO HIS?

2 THE WITNESS: I BELIEVE SO, YES, MA'AM.

3 THE COURT: OKAY. AND IF YOU LOOK AT HIS SEVEN
4 FACTORS IT ALMOST LOOKS AS IF -- KEEP GOING DOWN -- NUMBER
5 TWO. IT ALMOST LOOKS LIKE IT WAS CUT AND PASTED BECAUSE YOU
6 STILL HAVE DR. KENNEDY'S NAME IN THERE WHEN IT'S REALLY DR.
7 ALGHOTHANI.

8 SO, I'M TRYING TO FIND OUT HOW MUCH CONSIDERATION WAS
9 GIVEN TO THESE FACTORS. AND IF YOU LOOK AT IT, DR.
10 ALGHOTHANI WAS RECOMMENDED APPROXIMATELY \$21,795 MORE IN
11 MARKET PAY THAN DR. KENNEDY. AND I WANT TO FIND OUT FROM YOU
12 WHAT WOULD HAVE BEEN YOUR REASON FOR GIVING HIM A DIFFERENT
13 SALARY IF YOU COMPARE HIS EXPERIENCE WITH DR. KENNEDY.

14 SO IF YOU GO BACK TO THE SEVEN FACTORS FOR DR.
15 ALGHOTHANI, HE HAS OVER 17 YEARS OF EXPERIENCE WHEREAS DR.
16 KENNEDY HAD 20 YEARS OF EXPERIENCE. WHAT IS IT THAT MADE DR.
17 ALGHOTHANI MORE I GUESS ELIGIBLE FOR A HIGHER MARKET PAY
18 INCREASE THAN DR. KENNEDY?

19 THE WITNESS: I DON'T KNOW. THE ONLY THING THAT WE
20 REALLY CONSIDERED WAS THE ANNUAL PAY AND...

21 THE COURT: SO THEN WHAT WOULD MAKE HIS ANNUAL PAY
22 HIGHER? I GUESS, WAS HIS ANNUAL PAY HIGHER? IT WASN'T
23 HIGHER, BUT HE DID GET A HIGHER MARKET PAY. SO WHY WAS THAT?

24 THE WITNESS: I -- I DON'T KNOW.

25 THE COURT: OKAY. SO YOU REALLY DIDN'T LOOK AT

1 THOSE SEVEN FACTORS AND COMPARE EACH PERSON IN THE DEPARTMENT
2 TO SEE IF ONE HAD MORE EXPERIENCE OR DONE MORE THAN THE
3 OTHER.

4 THE WITNESS: RIGHT. WE DIDN'T COMPARE BETWEEN THE
5 PEOPLE. WE WERE PRESENTED THE INFORMATION BY DR. MILLER AND
6 THEN EITHER AGREED THAT IT SOUNDED REASONABLE OR DIDN'T, AND
7 IN THIS CASE WE DID.

8 THE COURT: OKAY. ALL RIGHT. THANK YOU. ANYTHING
9 ELSE?

10 MR. ANDREWS: JUST A FEW MORE QUESTIONS, YOUR HONOR
11 IN LIGHT...

12 BY MR. ANDREWS:

13 Q SO DR. DOWNIE, JUST SO I UNDERSTAND, DR. MILLER, THE
14 SERVICE LINE CHIEF, WOULD BE -- COME TO THE PAY PANEL WITH
15 RECOMMENDATION; IS THAT CORRECT?

16 A YES.

17 Q AND IS THAT HOW IT OPERATED ON EACH OF THE PANELS YOU
18 SERVED ON?

19 A YES.

20 Q SO THEY WOULD PRESENT YOU WITH THE INFORMATION TO BE
21 CONSIDERED?

22 A YES.

23 Q WOULD IT BE UNUSUAL THAT THE SERVICE LINE CHIEF WOULD
24 PREPARE THE INFORMATION FOR THE COMPENSATION PANEL REVIEW?

25 A NO.

1 Q THAT'S HOW IT WOULD OPERATE WITH EACH COMPENSATION
2 PANEL?

3 A YES.

4 Q AND YOU VIEWED YOUR ROLE TO -- AS A -- TO LOOK AT THE
5 ANNUAL PAY NUMBER AND DETERMINE WHETHER THE SALARY WAS GOING
6 TO BE FAIR FOR EACH DOCTOR; IS THAT CORRECT?

7 A YES.

8 Q NOW, YOU WOULD ALSO BE PRESENTED WITH MARKET -- I SHOULD
9 SAY REGIONAL, LOCAL MARKET PAY DATA; CORRECT?

10 A YES.

11 Q SO YOU COULD LOOK AND SEE WHERE EACH DOCTOR FELL IN
12 RELATION TO THOSE REGIONAL PAY NUMBERS; IS THAT CORRECT?

13 A YES.

14 Q AND YOU WOULD DO THAT INDIVIDUALLY FOR EACH DOCTOR?

15 A YES.

16 Q AND SO IF ONE DOCTOR WERE OUT OF LINE, A LITTLE BIT
17 HIGHER THAN THE RANGE OR LOWER IN THE RANGE, YOU WOULD
18 UNDERSTAND THAT; CORRECT?

19 A YES.

20 Q OKAY.

21 MR. ANDREWS: I DON'T HAVE ANY OTHER QUESTIONS,
22 YOUR HONOR.

23 THE COURT: ALL RIGHT. ANYTHING ELSE, MR. IRVIN?

24 MR. IRVIN: NO, MA'AM, YOUR HONOR.

25 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. YOU

1 CAN STEP DOWN. YOU'RE EXCUSED.

2 (WITNESS LEFT THE STAND.)

3 MR. IRVIN: YOUR HONOR, MIGHT THIS BE A GOOD TIME
4 TO TAKE A SHORT BREAK? WE ARE GETTING READY TO SHIFT GEARS
5 TO THE NOVEMBER OF 2016 PANEL REVIEWS. AND IF--

6 THE COURT: THAT'S FINE. WE CAN TAKE A BREAK.
7 THANK YOU.

8 (WHEREUPON, A BRIEF RECESS WAS HAD.)

9 MR. ANDREWS: YOUR HONOR, IF I COULD JUST BRIEFLY
10 ADDRESS ONE ISSUE. MRS. WOODS HERE HAS DILIGENTLY EXAMINED
11 DR. FICHTNER'S DEPOSITION TRANSCRIPT. AS YOU MAY RECALL, DR.
12 FICHTNER WAS THE DOCTOR WHO CAN'T BE PRESENT. WE JUST
13 IDENTIFIED THREE LINES THAT I THINK WERE INADVERTENTLY LEFT
14 OUT OF THE DESIGNATIONS, AND SO WE JUST WANT TO MAKE NOTE OF
15 THAT FOR THE RECORD.

16 MR. IRVIN: NO OBJECTION TO INCLUDING IT, YOUR
17 HONOR.

18 MR. ANDREWS: SO THAT WOULD BE -- THE PART THAT WAS
19 INADVERTENTLY STRUCK THAT WAS ON OUR COUNTER-DESIGNATIONS
20 WOULD BE ON PAGE 25 OF DR. FICHTNER'S DEPOSITION TRANSCRIPT
21 LINES 23 THROUGH 25. THAT'S THE BEGINNING OF A QUESTION.
22 AND THEN ON THE NEXT PAGE THE ANSWER IS ACTUALLY ALREADY
23 INCLUDED, BUT THE ENTIRE QUESTION WAS NOT INCLUDED, SO WE
24 JUST WANTED TO MAKE A NOTE OF THAT.

25 THE COURT: OKAY.

1 MR. ANDREWS: THANK YOU.

2 THE COURT: ALL RIGHT. THANK YOU. MAY CALL YOUR
3 NEXT WITNESS.

4 MR. IRVIN: DR. ALAN CARR.

5 (WITNESS ENTERED THE COURTROOM.)

6 DR. ALAN CARR, AFTER BEING DULY SWORN,
7 TESTIFIED AS FOLLOWS:

8 DIRECT EXAMINATION

9 BY MR. IRVIN:

10 Q GOOD MORNING, DR. CARR.

11 A GOOD MORNING.

12 Q YOU HAVE BEEN PATIENT WAITING ON US THIS MORNING AND WE
13 ALL APPRECIATE THAT. MY NAME IS WILMOT IRVIN AND I REPRESENT
14 DR. RICK KENNEDY WHO IS SEATED HERE WITH ME AT COUNSEL TABLE.
15 AND YOU AND I MET YOU MAY REMEMBER WHEN WE TOOK YOUR
16 DEPOSITION IN THIS CASE, AND THAT TOOK PLACE ON NOVEMBER THE
17 13TH OF 2017.

18 DO YOU RECALL GIVING YOUR TESTIMONY ON THAT DATE?

19 A YES.

20 Q ALL RIGHT, SIR. AND I JUST HAVE SOME QUESTIONS TO ASK
21 YOU THAT WILL SORT OF TRACK ALONG WITH WHAT YOU HAVE ALREADY
22 GIVEN, BUT WE NEED TO GET IT INTO THE COURTROOM, SO HERE WE
23 ARE. LET ME FIRST JUST GET YOUR -- BRIEFLY YOUR BACKGROUND
24 IN. YOU ARE CURRENTLY EMPLOYED AT DORN VA?

25 A YES.

1 Q AND IN THE SAME CAPACITY, THAT IS SPECIALIZING IN
2 EMERGENCY MEDICINE AS A PHYSICIAN AT THE DORN VA?

3 A YES.

4 Q OKAY. SO NOTHING HAS CHANGED IN TERMS OF YOUR JOB
5 STATUS OR MAJOR DUTIES OR RESPONSIBILITIES SINCE WE HAD YOUR
6 DEPOSITION?

7 A CORRECT.

8 Q OKAY. AND SO YOU HAVE BEEN AT DORN IN THAT CAPACITY FOR
9 SIX YEARS OR SO? DOES THAT SOUND ABOUT RIGHT?

10 A YES.

11 Q WHEN DID YOU START AT DORN VA?

12 A DECEMBER 2011.

13 Q OKAY. SO LITTLE MORE THAN SIX YEARS NOW, BUT -- OKAY.
14 NOW, OVER THE COURSE OF THAT TIME PERIOD, HAVE YOU HAD
15 EXPERIENCE IN SERVING ON THESE COMPENSATION OR PAY PANELS
16 THAT ARE USED TO REVIEW PHYSICIANS AT DORN'S SALARY
17 INFORMATION?

18 A YES.

19 Q OKAY. AND THE REASON THAT YOU'RE HERE TODAY IS BECAUSE
20 YOU WERE FORTUNATE ENOUGH TO BE ONE OF THE PANEL MEMBERS FOR
21 REVIEWS OF THE STAFF ANESTHESIOLOGISTS THAT OCCURRED ON
22 NOVEMBER THE 10TH OF 2016. DO YOU RECALL THAT TAKING PLACE?

23 A VAGUELY.

24 Q OKAY. I'M GOING TO JUST SHOW YOU, AND HOPEFULLY IT WILL
25 BE OF SOME ASSISTANCE, WHAT WE HAVE MARKED AS PLAINTIFF'S

1 EXHIBIT NUMBER 12. THIS IS ALREADY IN EVIDENCE.

2 A UH-HUH.

3 MR. IRVIN: AND YOUR HONOR, CAN I APPROACH THE
4 WITNESS, PLEASE?

5 THE COURT: YOU MAY.

6 MR. IRVIN: THANK YOU.

7 BY MR. IRVIN:

8 Q THIS IS ALL OF THE REVIEWS OF THE FIVE STAFF
9 ANESTHESIOLOGISTS INCLUDING DR. KENNEDY THAT WERE CONDUCTED
10 ON NOVEMBER 10TH OF 2016. I THINK WE ARE ALL IN AGREEMENT
11 THERE. AND AS I UNDERSTAND YOUR PRIOR TESTIMONY, YOU WERE
12 ONE OF THE PANEL MEMBERS AND ACTUALLY SERVED AS THE
13 CHAIRPERSON OF THE PANEL FOR THOSE STAFF REVIEWS.

14 DOES THAT APPEAR TO BE CORRECT?

15 A YES.

16 Q OKAY. AND IS THAT YOUR SIGNATURE THAT APPEARS THERE ON
17 THIS FIRST DR. ALGHOOTHANI REVIEW THAT TOOK PLACE ON NOVEMBER
18 THE 10TH OF 2016?

19 A THAT'S MY SIGNATURE.

20 Q YEAH. OKAY. AND YOU CERTAINLY TAKE AS MUCH TIME AS YOU
21 LIKE AT ANY POINT TO LOOK THROUGH THOSE REVIEWS. BUT JUST
22 WHY DON'T YOU TAKE A MOMENT JUST TO LOOK THROUGH AND SEE THAT
23 YOUR SIGNATURE APPEARS ON EACH OF THE FIVE REVIEWS AS THE
24 CHAIRPERSON OF THE COMP PANEL ON NOVEMBER 10TH OF 2016.
25 THAT'S EXHIBIT 12.

1 ALL RIGHT, SIR. HAVE YOU HAD A CHANCE TO LOOK AND SEE
2 THAT YOUR SIGNATURE APPEARS AS CHAIRPERSON ON EACH OF THOSE
3 FIVE STAFF ANESTHESIOLOGISTS' --

4 A YES.

5 Q -- REVIEWS? THANK YOU, DR. CARR. NOW, OVER THE YEARS
6 AT DORN I THINK YOU TOLD ME THAT YOU APPROXIMATE THAT YOU
7 PROBABLY PARTICIPATED IN MAYBE 50 OR SO OF THESE COMPENSATION
8 PANEL REVIEWS AT LEAST AS OF WHEN WE TOOK YOUR DEPOSITION A
9 YEAR OR SO AGO. IS THAT ABOUT ACCURATE?

10 A YES.

11 Q AND MAYBE YOU HAVE DONE SOME ADDITIONAL TO THAT 50 OR SO
12 SINCE WE TOOK YOUR DEPOSITION?

13 A YES.

14 Q OKAY. ALL RIGHT. NOW, IN ALL YOUR TIME THERE AT DORN
15 AND THROUGHOUT THE COURSE OF THESE 50 OR MORE PHYSICIAN
16 COMPENSATION PANEL REVIEWS, HAVE YOU -- DO YOU REMEMBER EVER
17 PARTICIPATING IN ANY OTHER PANEL REVIEW BESIDES THIS ONE THAT
18 INVOLVES THESE FIVE STAFF ANESTHESIOLOGISTS WHERE THE PURPOSE
19 WAS TO ENSURE THAT THERE WAS NO PAY DISPARITY WITHIN A GROUP?
20 HAD THAT EVER COME UP BEFORE OR SINCE?

21 A NO.

22 Q OKAY. NOW, BEFORE YOU STARTED SERVING ON THESE PANELS
23 AND BEING THE CHAIRPERSON AND SO FORTH, DID YOU RECEIVE ANY
24 FORMAL TRAINING ABOUT HOW TO DO THAT?

25 A THERE'S A DOCUMENT THAT'S DISTRIBUTED TO EVERYONE THAT'S

1 ON THE PAPERWORK TO REVIEW, AND I REVIEWED THAT DOCUMENT.

2 Q OKAY. BUT ASIDE FROM GETTING A DOCUMENT AND REVIEWING
3 IT, DID ANYBODY EVER SIT YOU DOWN OR PUT YOU IN ANY KIND OF A
4 TRAINING CLASS AND SAY, HERE'S HOW IT'S GOING TO WORK AND
5 HERE'S WHAT YOUR JOB IS AND HERE'S WHAT YOU'RE TO DO AND
6 HERE'S THE HANDBOOK AND FOLLOW THIS, AND THAT KIND OF THING?

7 A NO.

8 Q OKAY. YOU SEE THAT THE LANGUAGE ON EXHIBIT 12 -- IF YOU
9 WANT TO TAKE THAT AGAIN. IF YOU LOOK AT THAT FIRST PAGE --
10 AND THIS IS DR. ALGHOTHANI'S REVIEW, BUT I'LL REPRESENT TO
11 YOU THAT THE SAME TYPED LANGUAGE APPEARS ON ALL FIVE OF THESE
12 FORMS.

13 A UH-HUH.

14 Q BUT YOU'LL SEE ABOUT A THIRD OF THE WAY DOWN ON THAT
15 FIRST PAGE SOMEONE HAS TYPED IN THERE, ANESTHESIOLOGY SERVICE
16 IS CONDUCTING A REVIEW OF PROVIDERS' PAY TO ENSURE THERE IS
17 NO PAY DISPARITY.

18 DO YOU SEE THAT THERE?

19 A YES.

20 Q THAT'S WHAT I WAS ASKING YOU ABOUT A MOMENT AGO ABOUT
21 WHETHER THAT HAD EVER BEEN THE GOAL OF ANY OTHER PANEL. BUT
22 DID YOU -- DID ANYBODY EXPLAIN TO YOU WHAT THAT MEANT?

23 A NO.

24 Q DID YOU UNDERSTAND WHY THAT WAS BEING DONE?

25 A I DIDN'T QUESTION WHY IT WAS BEING DONE.

1 Q OKAY. AND NO ONE, AS BEST AS YOU CAN REMEMBER,
2 EXPLAINED WHY THAT WAS THE PURPOSE, TO ENSURE NO PAY
3 DISPARITY?

4 A NO ONE.

5 Q OKAY. THANK YOU VERY MUCH. THAT'S ALL THE QUESTIONS I
6 HAVE, DR. CARR. AND PLEASE ANSWER ANY QUESTIONS THAT THE VA
7 HAS FOR YOU.

8 CROSS-EXAMINATION

9 BY MR. ANDREWS:

10 Q GOOD MORNING, DR. CARR.

11 A MORNING.

12 Q THANK YOU FOR BEING WITH US THIS MORNING. I WILL BE
13 BRIEF. YOU HAVE BEEN ASKED ABOUT THIS PARTICULAR DOCUMENT,
14 PLAINTIFF'S EXHIBIT 12.

15 A YES.

16 Q IF WE COULD LOOK AT THAT. DO YOU SEE HERE -- LOOK IN
17 THE MIDDLE. IF WE COULD ZOOM IN. SAYS HERE, THE
18 CONSIDERATION OF THE PANEL SHALL TAKE INTO ACCOUNT. AND THEN
19 IT LISTS SEVERAL FACTORS. DO YOU SEE THAT?

20 A SAY AGAIN.

21 Q DO YOU SEE THE -- RIGHT HERE IN PART B, PANEL FINDINGS,
22 ON THE SCREEN?

23 A OH, YES.

24 Q DO YOU SEE WHERE IT SAYS, CONSIDERATION OF THE PANEL
25 SHALL TAKE INTO ACCOUNT, AND THEN IT LISTS CERTAIN FACTORS?

1 A YES.

2 Q NOW, WHEN YOU SERVED ON THE PAY PANEL FOR EACH OF THE
3 ANESTHESIOLOGISTS, DID YOU TAKE THOSE FACTORS INTO
4 CONSIDERATION?

5 A YES.

6 Q OKAY. NOW, AND YOUR ULTIMATE RECOMMENDATION OF ANNUAL
7 PAY FOR EACH OF THESE DOCTORS WAS \$300,000; IS THAT CORRECT?

8 A CORRECT.

9 Q AND YOU SIGNED YOUR NAME TO EACH OF THOSE PAY PANEL
10 ACTIONS; IS THAT CORRECT?

11 A CORRECT.

12 Q WOULD YOU HAVE RECOMMENDED ANNUAL PAY THAT YOU DID NOT
13 BELIEVE WAS FAIR?

14 A NO.

15 Q WOULD YOU HAVE RECOMMENDED ANNUAL PAY THAT YOU BELIEVED
16 DISCRIMINATED AGAINST OLDER DOCTORS?

17 A NO.

18 Q THANK YOU.

19 MR. IRVIN: NOTHING FURTHER OF THIS WITNESS, YOUR
20 HONOR.

21 THE COURT: OKAY. THANK YOU VERY MUCH. YOU CAN
22 STEP DOWN. YOU'RE EXCUSED.

23 (WITNESS LEFT THE STAND.)

24 (WITNESS ENTERED THE COURTROOM.)

25 DR. RAMOTH COX, AFTER BEING DULY SWORN,

1 TESTIFIED AS FOLLOWS:

2 DIRECT EXAMINATION

3 BY MR. IRVIN:

4 Q GOOD MORNING, DR. COX.

5 A GOOD MORNING.

6 Q THANK YOU FOR BEING HERE TODAY.

7 A THANK YOU.

8 Q DO YOU RECALL THAT I HAD THE OPPORTUNITY TO TAKE YOUR
9 DEPOSITION TESTIMONY EARLIER IN THIS CASE BACK IN NOVEMBER OF
10 2017?

11 A YES.

12 Q ALL RIGHT. AND THAT I'M A LAWYER WHO REPRESENTS RICK,
13 DR. RICK KENNEDY, WHO IS HERE TODAY.

14 A UH-HUH.

15 Q AND I WANT TO ASK YOU SOME QUESTIONS AND MOSTLY JUST
16 SORT OF TRACKING ALONG WHAT WE TALKED ABOUT AT THE TIME OF
17 YOUR DEPOSITION. AND LET ME FIRST GET A LITTLE BIT OF
18 BACKGROUND FOR THE RECORD. AS I UNDERSTAND IT, YOU ARE A
19 PHYSICIAN AND YOU ARE EMPLOYED AT THE DORN VA; IS THAT
20 CORRECT?

21 A YES.

22 Q AND YOUR SPECIALTY IS IN INTERNAL MEDICINE?

23 A YES.

24 Q ALL RIGHT. AND YOU ARE ALSO THE CHIEF OF
25 COMMUNITY-BASED OUTPATIENT CARE SERVICE AND HAVE -- ARE YOU

1 STILL IN THAT CAPACITY?

2 A YES.

3 Q AND YOU HAVE HELD THAT, THAT POSITION, CONTINUOUSLY
4 SINCE 2009?

5 A YES.

6 Q AS I RECALL? OKAY. AND I GUESS THAT MEANS THAT YOU'RE
7 THE MEDICAL DIRECTOR OF THE -- OF DORN VA'S COMMUNITY-BASED
8 CLINICS THAT ARE LOCATED THROUGHOUT SOUTH CAROLINA?

9 A YES.

10 Q SORT OF THE OUTREACH, OUT -- IF DORN VA ON GARNERS FERRY
11 ROAD IS THE HUB, THEN THESE FOLKS GO OUT IN THE STATE TO
12 THESE VARIOUS COMMUNITY-BASED CENTERS; IS THAT RIGHT?

13 A YES.

14 Q AND THAT'S WHAT YOU DO?

15 A YES.

16 Q OKAY. ALL RIGHT. NOW, LET ME SHOW YOU WHAT WE HAVE
17 MARKED AS PLAINTIFF'S EXHIBIT NUMBER 12. AND I'LL TELL YOU
18 THAT THIS IS A COLLECTION OF THE PAY PANEL, COMPENSATION PAY
19 PANEL, REVIEW FORMS FOR A SERIES OF REVIEWS THAT TOOK PLACE
20 ON NOVEMBER THE 10TH OF 2016.

21 AND WHAT I'D LIKE TO ASK YOU TO DO IS SIMPLY TO TAKE A
22 MOMENT TO LOOK THROUGH THOSE BECAUSE THERE ARE FIVE REVIEWS
23 OF THE FIVE STAFF ANESTHESIOLOGISTS AT DORN AND JUST CONFIRM
24 THAT YOUR SIGNATURE APPEARS AS A PANEL MEMBER ON THOSE
25 COMPENSATION PANEL ACTION FORMS FOR EACH OF THE FIVE STAFF

1 ANESTHESIOLOGISTS.

2 A YES.

3 Q OKAY. NOW, OVER YOUR TIME AT DORN VA AS A PHYSICIAN,
4 YOU HAVE SERVED ON A BUNCH OF THESE PANELS OVER THE YEARS?

5 A A NUMBER OF THEM, YES.

6 Q OKAY. AND I BELIEVE YOU SAID THAT THE -- AT LEAST MORE
7 RECENTLY YOU WERE CALLED UPON TO SERVE ON THESE PANELS MAYBE
8 ONCE OR TWICE A MONTH EVEN. IS THAT A FAIR ASSESSMENT?

9 A I MEAN, NOT NECESSARILY MORE RECENTLY. THE SYSTEM HAS
10 CHANGED AS PREVIOUSLY THEY WEREN'T SCHEDULED AND IT WAS -- WE
11 WOULD DO THEM AS NEEDED WHEREAS NOW THEY ACTUALLY HAVE THEM
12 SCHEDULED EACH WEEK AND THEN WE DO THEM IF NEEDED.

13 Q OKAY.

14 A IT'S A LITTLE BIT MORE STANDARDIZED.

15 Q ALL RIGHT. NOW IF YOU WILL LOOK ON EXHIBIT 12, WE CAN
16 JUST USE THE TOP SHEET THAT YOU HAVE THERE. YOU WILL SEE
17 ABOUT A THIRD OF THE WAY DOWN THERE IS SOME TYPEWRITTEN
18 LANGUAGE UNDER PART A.

19 A UH-HUH.

20 Q AND IT SAYS, ANESTHESIOLOGY SERVICE IS CONDUCTING A
21 REVIEW OF PROVIDERS' PAY TO ENSURE THERE IS NO PAY DISPARITY.
22 DO YOU SEE THAT LANGUAGE AS IT APPEARS THERE?

23 A I DO.

24 Q OKAY. NOW, DID ANYONE ON THE PANEL INCLUDING YOURSELF
25 ASK ANY QUESTIONS ABOUT WHAT WAS MEANT BY THAT LANGUAGE,

1 REFERRING TO NO PAY DISPARITY?

2 A NOT THAT I RECALL.

3 Q OKAY. SO NEITHER YOU NOR -- YOU DON'T RECALL IT -- THE
4 OTHER PANEL MEMBERS ASKING, WHAT DOES THAT MEAN?

5 A NO, SIR.

6 Q OKAY. ALL RIGHT. AND I BELIEVE YOU SAID THAT IN YOUR
7 EARLIER TESTIMONY THAT YOU DON'T RECALL DR. MILLER MAKING A
8 PRESENTATION TO THE PANEL ABOUT THE PURPOSE OF THE REVIEWS
9 BEING TO ENSURE THERE WAS NO PAY DISPARITY. IS THAT CORRECT?

10 A I DON'T REMEMBER THAT EXACT STATEMENT FROM HIM, NO.

11 Q OKAY. ALL RIGHT. AND AS I UNDERSTAND IT, THE PANEL ON
12 THIS DATE FOCUSED ON THE ANNUAL PAY RECOMMENDATIONS MADE BY
13 DR. MILLER FOR THESE FIVE STAFF ANESTHESIOLOGISTS. IS THAT A
14 FAIR STATEMENT?

15 A YES.

16 Q ALL RIGHT. AND YOU TAKE A MOMENT TO LOOK, BUT AS I
17 BELIEVE IS THE CASE FOR EACH OF THESE FIVE STAFF
18 ANESTHESIOLOGISTS, DR. MILLER, AS THE SERVICE LINE CHIEF, PUT
19 FORWARD A RECOMMENDATION FOR THE EXACT SAME AMOUNT OF ANNUAL
20 PAY FOR EACH OF THESE STAFF ANESTHESIOLOGISTS BEING \$300,000;
21 IS THAT CORRECT?

22 A YES.

23 Q ALL RIGHT. NOW, IN YOUR EXPERIENCE SERVING ON PAY
24 PANELS, HAD YOU EVER -- DO YOU RECALL EVER HAVING A PAY PANEL
25 WHERE A SERVICE LINE CHIEF CAME IN AND -- FOR THE STATED

1 PURPOSE OF ENSURING THERE WAS NO PAY DISPARITY AND WANTING TO
2 AWARD EACH AND EVERY MEMBER OF A SERVICE THE EXACT SAME
3 AMOUNT OF ANNUAL SALARY?

4 A I MEAN, I DON'T -- I DON'T RECALL ANY SPECIFIC
5 INSTANCES.

6 Q OKAY. BUT THE PANEL THAT YOU SERVED ON ON THIS DATE
7 WOULD HAVE FOCUSED ON THAT 300,000 ANNUAL PAY RECOMMENDATION
8 AND NOT ON ANY DISCRETE MARKET PAY OR BASE PAY PORTION OF
9 THAT. IS THAT A FAIR STATEMENT?

10 A WOULD HAVE FOCUSED ON THE ANNUAL; THE ANNUAL PAY.

11 Q OKAY. AND IF YOU LOOK ON THE SECOND PAGE -- AND AGAIN
12 WE'LL JUST USE DR. ALGHOTHANI AS AN EXAMPLE -- YOU WILL SEE
13 ABOUT TWO-THIRDS OF THE WAY DOWN THERE IS A SECTION ENTITLED
14 PART C, ACTION BY APPROVING OFFICIAL.

15 DO YOU SEE THAT ON THE SECOND PAGE? AND IT SHOULD BE UP
16 ON THE SCREEN NOW.

17 A YES.

18 Q AND SO, AS I UNDERSTAND IT, THIS SECTION IS DONE BY THE
19 APPROVING OFFICIAL, NOT THE PANEL, AND YOU CAN SEE DOWN BELOW
20 WHERE SOMEONE NAMED DAVID L OMURA APPEARS TO BE THE APPROVING
21 OFFICIAL WHO HAS SIGNED AND DATED THIS FORM. DO YOU SEE THAT
22 THERE?

23 A YES.

24 Q SO MY QUESTION TO YOU IS, SOMEONE HAS HANDWRITTEN IN
25 THAT SECTION SOME NUMBERS. IT SAYS ANNUAL RATE OF PAY, BASE

1 PAY PLUS MARKET PAY, AND THEN SOMEONE HAS WRITTEN IN 104,322
2 FOR THE BASE PAY. IS THAT SOMETHING THE PANEL DID OR WOULD
3 THAT HAVE BEEN--

4 A THAT WASN'T DONE BY THE PANEL.

5 Q OKAY. AND THEN THE SECOND NUMBER, APPARENTLY THE MARKET
6 PAY, OF \$195,678, THERE AGAIN, WHOEVER WROTE THOSE NUMBERS IN
7 WOULD HAVE BEEN AFTER THE PANEL DID ITS WORK?

8 A YES.

9 Q AND SO YOU DIDN'T FOCUS ON NOR DID YOU KNOW WHAT THOSE
10 NUMBERS WERE.

11 A RIGHT.

12 Q BUT YOU UNDERSTAND, DO YOU NOT, DR. COX, THAT BASE PAY,
13 WHICH IS ONE OF THE TWO ELEMENTS OF TOTAL ANNUAL PAY, IS A
14 LONGEVITY PAY NUMBER THAT COMES OFF OF A TABLE. DO YOU
15 UNDERSTAND THAT?

16 A I KNOW THERE'S A BASE PAY AND THEN THERE'S A MARKET
17 COMPONENT.

18 Q OKAY. AND DO YOU UNDERSTAND THAT THE BASE PAY, THOUGH,
19 IS JUST A FIXED NUMBER OFF OF A LONGEVITY TABLE? THERE'S NO
20 DISCRETION ABOUT HOW MUCH --

21 A I DO.

22 Q -- THAT SHOULD BE?

23 A THERE IS -- YES, THAT'S NOT SOMETHING THAT IS
24 CHANGEABLE.

25 Q OKAY. AND SO, THE ARITHMETIC CALCULATION THEN THAT'S ON

1 THIS PAGE -- AND WE JUST LOOKED AT IT THAT SOMEONE HAS
2 HANDWRITTEN IN -- IF YOU WANTED TO KNOW WHAT THE MARKET PAY
3 WAS, YOU COULD TAKE THE ANNUAL PAY RECOMMENDATIONS -- WHICH
4 WERE APPROVED BY THE PANEL, WERE THEY NOT, THE \$300,000 --

5 A YES.

6 Q -- FOR EACH ONE OF THESE STAFF ANESTHESIOLOGISTS?

7 A YES.

8 Q YOU COULD TAKE THAT NUMBER AND THEN YOU COULD SUBTRACT
9 FROM IT THE BASE PAY FIXED AMOUNT OFF THE LONGEVITY TABLE AND
10 THAT WOULD GIVE YOU THE MARKET PAY. IS THAT A FAIR
11 STATEMENT?

12 A THAT I DON'T -- THAT I DON'T KNOW. ALL WE DID WAS LOOK
13 AT THE ANNUAL PAY RECOMMENDATION BASED ON THE PRESENTATION BY
14 THE SERVICE CHIEF.

15 Q OKAY. AND AGAIN, YOU AND THE OTHER PANEL MEMBERS
16 ACCEPTED THE RECOMMENDATION OF DR. MILLER THAT EACH AND EVERY
17 ONE OF THEM SHOULD RECEIVE 300,000 IN ANNUAL PAY.

18 A IT APPEARS THAT WAY BASED ON THE DOCUMENTS, YES.

19 Q OKAY. AND I ASKED YOU IN YOUR DEPOSITION ABOUT WHETHER
20 YOU SAW ANY REASON WHY ANY OF THESE FIVE ANESTHESIOLOGISTS
21 SHOULD RECEIVE MORE OR LESS THAN THE RECOMMENDATION FOR
22 300,000 FOR EACH ONE, AND I BELIEVE YOU SAID THAT YOU
23 REALLY -- YOU CAN'T SAY THAT YOU REALLY COMPARED THEM. IS
24 THAT A FAIR STATEMENT?

25 A THE PRESENTATIONS WERE MADE INDIVIDUAL ON THE -- ON THE

1 INDIVIDUAL PERSON PER, YOU KNOW, EMPLOYEE. AND BASED ON WHAT
2 WAS PRESENTED BY THE CHIEF, THERE WAS A RECOMMENDATION AND WE
3 EITHER AGREED OR HAD DISCUSSION OR DIDN'T AGREE. IN THIS
4 SENSE WE AGREED. BUT YEAH, THAT -- THAT -- WE WEREN'T
5 LOOKING AT COMPARING.

6 Q OKAY. YOU DID THEM ONE AT A TIME?

7 A WE DID THEM ONE AT A TIME.

8 Q BUT YOU DIDN'T COMPARE ONE AGAINST THE OTHER.

9 A WE DID ONE AT A TIME, AND THE CHIEF PRESENTED ALL -- THE
10 SEVEN ELEMENTS OF THE THINGS THAT WE TYPICALLY CONSIDER IN A
11 COMP PANEL.

12 Q OKAY. AND THEN YOU WENT TO THE SECOND ONE AND YOU DID
13 THAT ONE SEPARATELY AND YOU ACCEPTED THE RECOMMENDATION;
14 CORRECT?

15 A YES.

16 Q AND DIDN'T COMPARE HIM OR HER TO ANY OF THE OTHERS IN
17 DOING SO.

18 A I MEAN, NOT THAT I RECALL. THEY -- HE PRESENTED EACH
19 INDIVIDUAL AND WE, YOU KNOW, MADE THE RECOMMENDATION AND WE
20 CONCURRED WITH HIS RECOMMENDATION.

21 Q THANK YOU VERY MUCH FOR YOUR TIME TODAY, AND PLEASE
22 ANSWER ANY QUESTIONS THAT COUNSEL FOR THE VA HAS FOR YOU,
23 PLEASE.

24 A OKAY.

25 CROSS-EXAMINATION

1 BY MR. ANDREWS:

2 Q GOOD MORNING, DR. COX.

3 A GOOD MORNING.

4 Q THANK YOU FOR BEING WITH US THIS MORNING AND THANK YOU
5 FOR BEING PATIENT. SO YOU HAVE BEEN ASKING QUESTIONS ABOUT
6 WHETHER YOU COMPARED THE DOCTORS, AND I'D LIKE TO EXPLORE
7 THAT A LITTLE BIT. SO, IF WE COULD BRING THAT PLAINTIFF'S
8 EXHIBIT 12, PLEASE.

9 FIRST LET'S START ON THIS FIRST PAGE HERE. DO YOU SEE
10 THE -- RIGHT IN THE MIDDLE OF THE SCREEN UNDER PART B --

11 A UH-HUH.

12 Q -- SAYS, CONSIDERATION OF THE PANEL SHALL TAKE INTO
13 ACCOUNT, AND THEN IT LISTS SOME FACTORS. DO YOU RECOGNIZE
14 THESE FACTORS?

15 A YES.

16 Q ARE THESE THE FACTORS THAT YOU WOULD HAVE CONSIDERED IN
17 A PANEL, PAY PANEL REVIEW FOR EACH OF THESE
18 ANESTHESIOLOGISTS?

19 A RIGHT.

20 Q OKAY.

21 A THAT WOULD HAVE BEEN PRESENTED.

22 Q NOW, YOU SAID YOU CONSIDERED THE DOCTORS ONE AT A TIME;
23 CORRECT?

24 A UH-HUH.

25 Q AND YOU'RE CONSIDERING EACH OF THEM IN REFERENCE TO

1 THESE STANDARDS; CORRECT?

2 A YES.

3 Q OKAY. SO THAT THE STANDARDS YOU'RE CONSIDERING FOR THE
4 SETTING AND RECOMMENDATION OF ANNUAL PAY FOR EACH OF THESE
5 DOCTORS ARE THE SAME STANDARDS; CORRECT?

6 A YES.

7 Q YOU'RE HOLDING THEM TO THE SAME STANDARDS.

8 A YES.

9 Q SO IF YOU ARRIVE AT A RECOMMENDATION OF \$300,000 FOR
10 EACH OF THESE DOCTORS IN LIGHT OF THESE STANDARDS, WOULD IT
11 BE YOUR BELIEF THAT THESE DOCTORS ARE SIMILARLY QUALIFIED?

12 A YES.

13 Q DO YOU BELIEVE THAT THERE'S ANYTHING WRONG WITH
14 ELIMINATING PAY DISPARITY FOR DOCTORS WHO ARE SIMILARLY
15 QUALIFIED?

16 A I MEAN, IF THE QUALIFICATIONS ARE SIMILAR AND -- I DON'T
17 SEE ANYTHING WRONG WITH THAT.

18 Q OKAY. WOULD YOU HAVE APPROVED A SALARY THAT YOU DID NOT
19 THINK WAS FAIR?

20 A NO.

21 Q WOULD YOU HAVE APPROVED A SALARY THAT YOU BELIEVED WAS
22 DISCRIMINATORY TO OLDER DOCTORS?

23 A NO.

24 Q I DON'T HAVE ANY FURTHER QUESTIONS. THANK YOU.

25 REDIRECT EXAMINATION

1 BY MR. IRVIN:

2 Q DR. COX, IF I MIGHT, JUST ANOTHER QUESTION OR TWO TO
3 FOLLOW UP THERE. THE TOTAL SALARY WAS THE SAME; THAT IS
4 \$300,000 FOR EACH OF THESE FIVE ANESTHESIOLOGISTS. BUT IF
5 YOU LOOK AT THOSE SHEETS THAT YOU HAVE IN FRONT OF YOU THERE,
6 EXHIBIT 12, WOULD YOU JUST TURN TO THOSE SHEETS FOR ME IN
7 EXHIBIT 12 AND LOOK AT THE SECOND PAGE WHERE I ASKED YOU DOWN
8 TOWARDS THE BOTTOM ABOUT THE HANDWRITTEN AMOUNTS THAT ARE
9 ENTERED THERE FOR BASE PAY AND MARKET PAY AND ADD UP TO THE
10 \$300,000.

11 A UH-HUH.

12 Q LOOK AT THAT WITH ME. ON KENNEDY, SEE DOWN AT THE
13 BOTTOM THERE'S SOME PAGE NUMBERING THAT WE CALL BATES
14 NUMBERS, AND KENNEDY RFP100 IS DR. ALGHOTHANI'S SECOND SHEET.

15 A OKAY.

16 Q YOU SEE THERE THAT THE HANDWRITTEN MARKET PAY AMOUNT FOR
17 HIM IS 195,678. DO YOU SEE THAT THERE?

18 A YES.

19 Q OKAY. AND THEN IF YOU FLIP OVER TO KENNEDY RFP104, AND
20 THAT'S THE BEGINNING OF DR. KENNEDY'S COMP PANEL REVIEW FORM
21 FOR THIS SAME DAY, AND LOOK AT HIS SECOND SHEET, THAT'S
22 KENNEDY RFP105, THE HANDWRITTEN AMOUNT OF HIS MARKET PAY IS
23 168,758.

24 DO YOU SEE THAT THERE?

25 A YES.

1 Q SO THOSE NUMBERS SO FAR AREN'T THE SAME. THOSE ARE
2 DIFFERENT; IS THAT CORRECT?

3 A YES.

4 Q AND DR. KENNEDY'S MARKET PAY AMOUNT IS SUBSTANTIALLY
5 LESS BY \$25,000 OR SO THAN DR. ALGHOTHANI; IS THAT CORRECT?

6 A IT APPEARS SO.

7 Q OKAY. AND THEN FLIPPING ON OVER AND YOU'LL SEE ON
8 KENNEDY RFP109, THAT IS THE COMP PANEL FORM FOR DR. NGUYEN ON
9 THIS SAME DATE WHEN THE PANEL APPROVED THE ANNUAL OF 300,000,
10 YOU'LL SEE THAT DR. NGUYEN THERE HAS A MARKET PAY HANDWRITTEN
11 AMOUNT THERE OF 195,678. DO YOU SEE THAT THERE?

12 A UH-HUH.

13 Q OKAY. AND THAT HAPPENS TO BE THE SAME AMOUNT AS DR.
14 ALGHOTHANI RECEIVED. AND THEN IF YOU FLIP ON OVER YOU WILL
15 SEE ON PAGE 114, THIS IS THE REVIEW FOR DR. PENDER, AND ON
16 THE SECOND PAGE OF THIS SHEET YOU SEE THAT HIS MARKET PAY
17 AWARD WAS 192,313. DO YOU SEE THAT?

18 A YES.

19 Q OKAY. AND THEN IF YOU FLIP ON BEYOND YOU WILL SEE FOR
20 DR. PRYOR, BEGINNING AT 119 AND OVER ON 120, THAT HIS MARKET
21 PAY WAS 182,218. DO YOU SEE THAT?

22 A YES.

23 Q AND SO ALL OF THOSE OTHER STAFF PHYSICIANS,
24 ANESTHESIOLOGISTS BESIDES DR. KENNEDY, RECEIVED SUBSTANTIALLY
25 MORE IN MARKET PAY THAN DID DR. KENNEDY; CORRECT?

1 A IN MARKET PAY IT LOOKS FROM WHAT YOU'RE SHOWING HERE,
2 YES.

3 Q OKAY. AND SO, THERE IS -- THE PAY DISPARITY AS TO
4 MARKET PAY WAS NOT A RAISE; IS THAT CORRECT?

5 A THE -- WHAT WE CONSIDERED HIS ANNUAL PAY.

6 Q YES. BUT THE MARKET PAY AMOUNTS WERE NOT EQUALIZED.

7 A IT APPEARS THAT THE MARKET PAY AMOUNTS WEREN'T EQUAL
8 HERE, BUT WE CONSIDERED ANNUAL PAY.

9 Q THANK YOU. THAT'S ALL I HAVE.

10 MR. ANDREWS: YOUR HONOR, I HAVE A FEW MORE
11 QUESTIONS WITHIN THE SCOPE.

12 RECROSS-EXAMINATION

13 BY MR. ANDREWS:

14 Q DR. COX, I TOLD YOU I WAS DONE AND I HAVE JUST A FEW
15 MORE. BUT I'D LIKE TO FOCUS ON THESE NUMBERS AGAIN. NOW, IF
16 YOU LOOK AT -- AND WE'LL START WITH THIS IS DR. ALGHOTHANI,
17 AND YOU WERE JUST ASKED ABOUT THESE NUMBERS -- YOU SEE HERE
18 THAT DR. ALGHOTHANI'S BASE PAY IS \$104,322; CORRECT?

19 A UH-HUH.

20 Q AND HIS MARKET PAY WAS \$195,678; CORRECT? GO TO DR.
21 KENNEDY, PLEASE. NOW WE SEE HERE WITH DR. KENNEDY, HIS BASE
22 PAY IS SUBSTANTIALLY MORE THAN DR. ALGHOTHANI'S; CORRECT?

23 A YES.

24 Q IT'S \$131,242; CORRECT?

25 A YES.

1 Q AND THEN HIS MARKET PAY, AS HAS BEEN POINTED OUT, WAS
2 LESS. IT WAS 168,758; CORRECT?

3 A YES.

4 Q DO YOU KNOW WHAT AFFECT IT WOULD HAVE -- IF WE COULD
5 STAY THERE, ACTUALLY. DO YOU KNOW WHAT AFFECT IT WOULD HAVE
6 ON DR. KENNEDY'S ANNUAL PAY IF HE WAS GIVEN THE SAME MARKET
7 PAY AS DR. ALGHOTHANI?

8 A I MEAN, I'M ASSUMING IT WOULD BE HIGHER.

9 Q WOULD IT BE FAIR TO SAY THAT IT WOULD BE ALMOST \$30,000
10 HIGHER?

11 A I HAVE NOT DONE THE MATH, BUT I WILL TAKE YOUR WORD FOR
12 IT.

13 Q DO YOU BELIEVE WHEN TWO DOCTORS HAVE SIMILAR
14 QUALIFICATIONS THAT IT WOULD BE FAIR TO PAY ONE OF THEM
15 \$30,000 MORE THAN THE OTHER?

16 A I DO NOT.

17 Q I DON'T HAVE ANY FURTHER QUESTIONS. THANK YOU.

18 THE COURT: I JUST HAVE ONE QUESTION. I WANT TO
19 ASK A QUESTION ABOUT THE SEVEN FACTORS THAT YOU TAKE INTO
20 CONSIDERATION WHEN YOU'RE DOING THE ANNUAL REVIEWS.

21 THE WITNESS: YES.

22 THE COURT: DO YOU TAKE THOSE SEVEN FACTORS INTO
23 CONSIDERATION WHEN YOU'RE DETERMINING THE ANNUAL SALARY OR DO
24 YOU TAKE THE SEVEN FACTORS INTO CONSIDERATION WHEN YOU ARE
25 DETERMINING MARKET PAY?

1 THE WITNESS: WE -- WE ARE LOOKING AT ANNUAL
2 SALARIES.

3 THE COURT: SO THE SEVEN FACTORS DON'T PLAY INTO
4 WHAT THE MARKET PAY IS?

5 THE WITNESS: MARKET? NO.

6 THE COURT: OKAY.

7 THE WITNESS: TOTAL SALARY.

8 THE COURT: THANK YOU.

9 MR. IRVIN: WE ARE DONE.

10 THE COURT: THANK YOU. YOU'RE EXCUSED.

11 (WITNESS LEFT THE STAND.)

12 (WITNESS ENTERED THE COURTROOM.)

13 THE COURT: YOU MAY CALL YOUR NEXT WITNESS.

14 MR. IRVIN: THANK YOU, YOUR HONOR. WE CALL DR.
15 SMITH.

16 THE COURT: DR. SMITH, YOU MAY COME FORWARD AND
17 STOP AT THIS MICROPHONE IN FRONT OF THE COURT REPORTER AND BE
18 SWORN IN, PLEASE.

19 DR. STUART SMITH, AFTER BEING DULY SWORN,
20 TESTIFIED AS FOLLOWS:

21 DIRECT EXAMINATION

22 BY MR. IRVIN:

23 Q GOOD AFTERNOON, DR. SMITH. MY NAME IS WILMOT IRVIN AND
24 WE MET EARLIER IN THIS CASE. I TOOK YOUR DEPOSITION. DO YOU
25 RECALL THAT?

1 A YES, SIR.

2 Q OKAY. I JUST HAVE A VERY FEW QUESTIONS TO ASK YOU. AND
3 YOU ARE HERE TODAY BECAUSE YOU SERVED ON THE COMP PANEL
4 REVIEWS THAT WERE DONE ON NOVEMBER THE 10TH OF 2016 OF THE
5 FIVE STAFF ANESTHESIOLOGISTS AT DORN VA MEDICAL CENTER. DO
6 YOU RECALL SERVING ON THAT PANEL?

7 A YES, SIR.

8 Q OKAY. I'M JUST GOING TO PUT IN FRONT OF YOU -- DON'T
9 KNOW THAT WE'LL NEED TO EVEN LOOK AT IT, BUT IF WE DECIDE TO,
10 IT'S HERE FOR YOU. THOSE ARE THE COMP PANEL FORMS THAT YOU
11 LOOKED AT I THINK IN YOUR DEPOSITION. AND YOU WOULD HAVE
12 SIGNED THOSE FORMS, IS THAT CORRECT, AS A MEMBER OF THE
13 PANEL?

14 A MAY I LOOK AT THEM?

15 Q CERTAINLY. PLEASE DO.

16 A YES, SIR.

17 Q OKAY. AND SO THAT'S YOUR SIGNATURE THAT APPEARS ON EACH
18 OF THOSE FIVE STAFF ANESTHESIOLOGISTS' REVIEWS?

19 A YES, SIR.

20 Q OKAY. NOW, I THINK YOU SAID THAT -- IN YOUR DEPOSITION
21 TESTIMONY THAT YOU REMEMBER PORTIONS MAYBE BUT DON'T HAVE AN
22 INSTANT RECALL OF EVERYTHING THAT TOOK PLACE BUT THAT WHAT
23 YOU DO RECALL IS THAT THESE REVIEWS WERE NOT PARTICULARLY
24 NOTEWORTHY AND THEY WERE PRETTY STANDARD, THEY DIDN'T INVOLVE
25 ANY CONTROVERSY. IS THAT A FAIR STATEMENT OF YOUR

1 RECOLLECTION OF THIS?

2 A YES.

3 Q OKAY. ALL RIGHT. AND YOU HAVE SAT ON A GOOD MANY OF
4 THESE PANELS. I BELIEVE YOU HAVE BEEN AT DORN AS A
5 PHYSICIAN, A HOSPITALIST WHO SPECIALIZES IN INTERNAL MEDICINE
6 SINCE 2001. DOES THAT SOUND RIGHT?

7 A UH-HUH.

8 Q ALL RIGHT. AND SO COMING ON 17 YEARS OR SO YOU HAVE
9 SERVED ON A GOOD MANY OF THESE PANELS.

10 A YES, SIR.

11 Q ALL RIGHT. NOW, AS FAR AS WHAT SUM IS BASE PAY AND WHAT
12 SUM IS MARKET PAY, YOU DON'T REALLY KNOW HOW THAT IS ARRIVED
13 AT. YOU FOCUSED ON ANNUAL PAY AS A PANEL MEMBER. IS THAT
14 FAIR TO SAY?

15 A CORRECT.

16 Q AND WOULD THAT ALSO BE THE CASE GENERALLY FOR THE PANELS
17 THAT YOU SAT ON NOT JUST FOR ANESTHESIOLOGISTS BUT THROUGHOUT
18 YOUR 15, 16, 17 YEARS THERE AT DORN?

19 A CORRECT.

20 Q OKAY. ALL RIGHT. AND YOU HAVE NEVER BEEN GIVEN A COPY
21 OF THE FEDERAL STATUTE THAT APPLIES TO THE DETERMINATION OF
22 PHYSICIAN SALARIES AT THE VA; HAVE YOU, DR. SMITH?

23 A NOT THAT I RECALL.

24 Q OKAY. AND YOU NEVER RECEIVED ANY FORMAL TRAINING WHEN
25 YOU BEGAN DOING THESE PANELS WHERE YOU WERE BROUGHT IN AND

1 SORT OF TUTORED ABOUT WHAT ALL THE HANDBOOK SAYS AND THE
2 STATUTE SAYS AND HERE'S WHAT YOU'RE CALLED UPON TO DO AS A
3 PANEL MEMBER AND HERE'S HOW THE PROCESS WORKS. YOU NEVER
4 RECEIVED ANYTHING LIKE THAT; DID YOU?

5 A NOTHING THAT YOU DESCRIBED, SIR.

6 Q OKAY. THAT'S ALL THE QUESTIONS THAT I HAVE, DR. SMITH.
7 THANK YOU.

8 A THANK YOU.

9 CROSS-EXAMINATION

10 BY MR. ANDREWS:

11 Q MORNING, DR. SMITH.

12 A MORNING.

13 Q THANK YOU FOR BEING WITH US TODAY AND THANK YOU FOR
14 BEING PATIENT WITH US. NOW, I BELIEVE YOU JUST SAID THAT YOU
15 HAVE SERVED ON A NUMBER OF COMPENSATION PANELS IN THE COURSE
16 OF YOUR CAREER; IS THAT CORRECT?

17 A YES, SIR.

18 Q DO YOU HAVE ANY IDEA WHAT A ROUGH RANGE WOULD BE?

19 A MORE THAN 10, CERTAINLY LESS THAN A HUNDRED PROBABLY.

20 Q MORE THAN 10, LESS THAN A HUNDRED.

21 A YES, SIR.

22 Q BIG RANGE, BUT I WILL TAKE IT. YOU HAVE SERVED ON
23 COMPENSATION PANELS FOR ANESTHESIOLOGISTS; CORRECT?

24 A YES, SIR.

25 Q HAVE YOU SERVED ON COMPENSATION PANELS FOR DOCTORS OF

1 ANY OTHER SPECIALTY?

2 A I BELIEVE ALL OF THEM.

3 Q COULD YOU--

4 A I -- SURGERY, INTERNAL MEDICINE, GASTROENTEROLOGY,
5 ONCOLOGY, PAIN MEDICINE, I BELIEVE OPHTHALMOLOGY, PRIMARY
6 CARE, PSYCHIATRY.

7 Q NOW, IN THE COURSE OF YOUR SERVICE ON THESE COMPENSATION
8 PANELS, YOU WERE MAKING RECOMMENDATIONS OF ANNUAL PAY; IS
9 THAT CORRECT?

10 A CORRECT.

11 Q NOW, DO YOU UNDERSTAND -- IS IT TRUE TO SAY THAT ANNUAL
12 PAY IS BASE PAY PLUS MARKET PAY?

13 A YES.

14 Q AND YOU DIDN'T HAVE ANYTHING TO DO WITH THE CALCULATION
15 OF BASE PAY; IS THAT RIGHT?

16 A NO, SIR.

17 Q THAT WAS A SCHEDULED PROCESS THAT WAS CALCULATED BY HR;
18 CORRECT?

19 A I BELIEVE SO.

20 Q SO, IS IT FAIR TO SAY THAT AS YOU EVALUATED ANNUAL PAY,
21 THE ONLY REAL VARIABLE THAT YOU HAD ANY CONTROL OVER WAS
22 MARKET PAY? IS THAT FAIR?

23 A CORRECT.

24 Q OKAY. COULD WE SEE PLAINTIFF'S EXHIBIT 12, PLEASE? ALL
25 RIGHT. SO, DO YOU RECOGNIZE THIS DOCUMENT?

1 A MAY I?

2 Q ABSOLUTELY. YEAH. IT SHOULD BE THE SAME AS WHAT MR.
3 IRVIN JUST PRESENTED TO YOU.

4 A YES.

5 Q OKAY. NOW, LET'S SCROLL DOWN TO THE MIDDLE OF THE PAGE
6 WHERE WE SEE THE PANEL FINDINGS IN THIS -- YOU SEE THIS
7 LANGUAGE HERE THAT SAYS, CONSIDERATION OF THE PANEL SHALL
8 TAKE INTO ACCOUNT. AND THEN IT LISTS SOME FACTORS?

9 A YES.

10 Q DO YOU RECOGNIZE THOSE FACTORS?

11 A YES.

12 Q ARE THOSE THE FACTORS THAT YOU CONSIDERED IN THE
13 RECOMMENDATION OF PAY ON THE COMPENSATION PANEL?

14 A YES.

15 Q CAN WE TURN TO THE NEXT PAGE, PLEASE? SCROLL DOWN. AND
16 SO, WOULD THIS BE YOUR SIGNATURE HERE?

17 A YES.

18 Q AND THIS WOULD BE YOUR RECOMMENDATION OF ANNUAL PAY FOR
19 DR. ALGHOOTHANI; IS THAT CORRECT?

20 A YES.

21 Q OKAY. COULD YOU GO TO -- ACTUALLY COULD YOU GO TO DR --
22 OR SEVERAL. SO, WHAT WE ARE LOOKING AT HERE IS THE
23 COMPENSATION PANEL'S ACTION FOR DR. KENNEDY. COULD YOU TURN
24 TO THE NEXT PAGE, PLEASE? AND IF YOU SCROLL DOWN, DO YOU SEE
25 YOUR NAME THERE?

1 A YES, SIR.

2 Q AND THAT'S YOUR SIGNATURE AS WELL?

3 A YES.

4 Q AND YOU SEE THE RATE OF ANNUAL PAY RECOMMENDED IS
5 300,000; IS THAT CORRECT?

6 A YES.

7 Q OKAY. COULD YOU GO TO THE NEXT PAGE, PLEASE. NOW, WE
8 DISCUSSED JUST A MOMENT AGO THE CONSIDERATION OF THESE SEVEN
9 FACTORS IN THE COMPENSATION PANEL REVIEW, AND I WANT TO TALK
10 ABOUT THAT JUST A LITTLE BIT MORE. DO YOU RECOGNIZE THIS
11 PAGE IN FRONT OF YOU?

12 A YES, SIR.

13 Q YOU'VE SEEN THIS PAGE BEFORE?

14 A YES.

15 Q OKAY. NOW, COULD YOU ZOOM OUT, PLEASE, SO YOU CAN SEE
16 THE WHOLE PAGE? NOW, YOU SEE HERE THERE'S SEVEN FACTORS
17 LISTED ON THIS OR SEVEN PARAGRAPHS LISTED ON THIS PAGE. DO
18 YOU KNOW WHETHER THESE SEVEN PARAGRAPHS CORRESPOND WITH THE
19 SEVEN FACTORS?

20 A I BELIEVE SO, YES.

21 Q OKAY. LET'S WALK THROUGH THEM ONE AT A TIME. SO
22 PARAGRAPH ONE, DID THAT CORRESPOND WITH DR. KENNEDY'S
23 EXPERIENCE IN HIS SPECIALTY?

24 A YES.

25 Q LET'S LOOK AT PARAGRAPH TWO, AND I ACTUALLY WANT TO DRAW

1 ON THIS FOR A MINUTE. DOES THIS APPEAR TO YOU TO RELATE TO
2 THE PARTICULAR NEED FOR THE ANESTHESIOLOGY SPECIALTY AT THE
3 DORN MEDICAL CENTER?

4 A YES.

5 Q OKAY. CAN WE GO BACK TO DR. ALGHOTHANI'S, PLEASE, THE
6 CORRESPONDING PAGE WITH THE FACTORS. SO, I'D LIKE YOU TO
7 TAKE A LOOK AT THIS, DR. SMITH. YOU SEE IN PARAGRAPH ONE,
8 DOES THAT APPEAR TO YOU THAT -- TO RELATE TO DR. ALGHOTHANI'S
9 EXPERIENCE IN THE PRACTICE OF MEDICINE?

10 A YES.

11 Q OKAY. NOW PARAGRAPH TWO. COULD YOU READ THAT PARAGRAPH
12 FOR ME, PLEASE?

13 A THE NEED TO RETAIN AND MAINTAIN THIS SPECIALTY IS
14 CRITICAL TO THE SUCCESS OF THE DORN VA MEDICAL CENTER,
15 ANESTHESIOLOGY AND SURGICAL SERVICES. CURRENTLY
16 ANESTHESIOLOGY SERVICE HAS AGGRESSIVELY RECRUITED AND FAILED
17 TO FILE [SIC] ALL ANESTHESIOLOGY VACANCIES. THE SERVICE
18 CANNOT MAINTAIN COMPARABLE PAY COMPENSATION AND ASSIGNED
19 PERSONNEL DEPART DUE TO PAY COMPENSATION WILL DIRECTLY AFFECT
20 PATIENT CARE AND SERVICES PROVIDED AT DORN VA MEDICAL CENTER.
21 DR. KENNEDY IS WELL-TRAINED AND WITH HIS EXPERIENCE AND
22 LEADERSHIP ABILITIES THAT HE POSSESSES, VALUABLE MEMBER OF
23 OUR DORN ANESTHESIA TEAM.

24 Q NOW, IF YOU DON'T KNOW, SAY SO, BUT I WANT YOU TO TELL
25 ME, DO YOU KNOW IF THAT'S A TYPO?

1 A I DO NOT KNOW.

2 Q OKAY. ANSWER ME THIS. WOULD THIS PARAGRAPH BE RELEVANT
3 FOR EVERY ONE OF THE ANESTHESIOLOGISTS?

4 A YES.

5 Q BECAUSE IT'S ABOUT THE NEED FOR ANESTHESIOLOGY AT THE
6 DORN MEDICAL CENTER; CORRECT?

7 A CORRECT.

8 Q SO IT WOULD NOT BE INVOLVED INFORMATION THAT'S SPECIFIC
9 TO ANY ONE OF THESE DOCTORS; IS THAT FAIR?

10 A YES, SIR.

11 Q OKAY. LET ME GO BACK TO DR. KENNEDY, PLEASE. SO I
12 THINK WE WERE ON PARAGRAPH THREE. DOES THIS APPEAR TO YOU TO
13 REFLECT RELEVANT LOCAL MARKET SALARY DATA SUCH AS HAY'S DATA?

14 A YES.

15 Q OKAY. AND NUMBER FOUR, DOES THAT APPEAR TO YOU TO
16 RELATE TO DR. KENNEDY'S BOARD CERTIFICATIONS IN THE FIELD?

17 A YES.

18 Q OKAY. NUMBER FIVE, ANY PARTICULAR ACCOMPLISHMENTS IN
19 HIS SPECIALTY?

20 A YES, SIR.

21 Q OKAY. AND NUMBER SIX, ANY PRIOR VA EXPERIENCE?

22 A YES.

23 Q AND NUMBER SEVEN -- NUMBER SEVEN IS REALLY A CATCH-ALL,
24 ANYTHING ELSE THAT MIGHT BE RELEVANT TO THE PANEL'S
25 RECOMMENDATION.

1 A YES, SIR.

2 Q OKAY. NOW I ASKED YOU PREVIOUSLY ABOUT YOUR SERVICE ON
3 PAY PANELS FOR DOCTORS IN OTHER SPECIALTIES. AND I'M NOT
4 SURE THAT I CLOSED THE LOOP ON THIS, BUT I WANT TO MAKE
5 CLEAR, IN THE COURSE OF YOUR CONSIDERATION OF PAY FOR THESE
6 ANESTHESIOLOGISTS, DID THE PROCESS WORK ANY DIFFERENTLY THAN
7 WHAT IT MIGHT HAVE FOR A DOCTOR OF A DIFFERENT SPECIALTY?

8 A NO, SIR.

9 Q OKAY. NOW, WHEN CONSIDERING THESE SEVEN FACTORS, WERE
10 YOU UNDER AN UNDERSTANDING BY ANY REQUIREMENT OR GUIDELINE OR
11 ANYTHING YOU WERE TOLD THAT YOU HAD TO GIVE ANY PARTICULAR
12 FACTOR MORE WEIGHT THAN ANOTHER?

13 A NO, SIR.

14 Q AND IT MIGHT VARY ON A CASE-BY-CASE; WOULDN'T IT?

15 A YES.

16 Q OKAY. NOW, IN THE COURSE OF YOUR EXPERIENCE AS A DOCTOR
17 AND YOUR REVIEW OF RELEVANT MARKET DATA, WOULD YOU BELIEVE
18 THERE TO BE A GUARANTEE IN PRIVATE PRACTICE THAT A
19 60-YEAR-OLD DOCTOR WOULD MAKE MORE MONEY THAN A 50-YEAR-OLD
20 DOCTOR?

21 A NO, SIR.

22 Q HOW ABOUT A DOCTOR WITH 25 YEARS OF EXPERIENCE IN THE
23 FIELD, WOULD THEY BE GUARANTEED TO MAKE MORE MONEY THAN A
24 DOCTOR WITH 15 YEARS EXPERIENCE?

25 A NO.

1 Q HOW ABOUT FOR TWO DOCTORS WHO ARE SIMILARLY QUALIFIED,
2 WOULD IT -- WOULD THERE BE A GUARANTEE THAT THE OLDER DOCTOR
3 WOULD MAKE MORE MONEY?

4 A NO.

5 Q AND THERE'S NO GUARANTEE THAT IN PRIVATE PRACTICE YOUR
6 INCOME IS GUARANTEED TO GO UP AS YOU AGE; IS THAT RIGHT?

7 A NO, SIR.

8 Q OKAY. OR I'M SORRY -- DID -- IS THAT -- IS THAT--

9 A THERE'S NO GUARANTEE THAT WOULD GO UP.

10 Q THERE WAS NO GUARANTEE. JUST MAKE SURE WE HAVE A CLEAR
11 ANSWER ON THAT. THANK YOU. JUST GIVE ME ONE MOMENT, PLEASE.
12 NOW, IF WE COULD LOOK AT -- WE LOOKED AT DR. ALGHOTHANI'S
13 ANNUAL PAY AND THAT'S \$300,000; IS THAT --

14 A YES, SIR.

15 Q -- CORRECT? WE LOOKED AT DR. KENNEDY'S RECOMMENDED PAY
16 OF 2016, THAT WAS \$300,000; CORRECT?

17 A YES, SIR.

18 Q COULD WE LOOK AT THE OTHERS AS WELL, THE ANNUAL PAY FOR
19 EACH OF THE DOCTORS HERE? JUST WANT TO MAKE SURE THAT WE GET
20 THIS INTO THE RECORD. SO THIS WOULD BE DR. NGUYEN. DO YOU
21 SEE THE NUMBER OF RECOMMENDED ANNUAL PAY?

22 A THE TOP IS CUT OFF, SIR.

23 Q HOW ABOUT HERE IN THE PART C?

24 A YES.

25 Q DO YOU SEE THAT NUMBER \$300,000?

1 A YES.

2 Q THAT WAS RECOMMENDED FOR DR. NGUYEN?

3 A CORRECT.

4 Q GO TO THE NEXT DOCUMENT, PLEASE. THIS IS DR. PENDER.
5 AND AGAIN HERE IT SAYS A RECOMMENDED ANNUAL PAY OF \$300,000.

6 A YES.

7 Q IS THAT CORRECT? GO TO THE NEXT DOCTOR, PLEASE. AND
8 THIS IS DR. PRYOR, AND THERE'S ANOTHER RECOMMENDED PAY OF
9 \$300,000; IS THAT CORRECT?

10 A YES.

11 Q OKAY. COULD YOU SCROLL UP TO THE TOP, THE TOP OF THAT
12 DOCUMENT, PLEASE. THE FIRST PAGE OF THE PANEL ACTION. AND
13 WE'LL LEAVE IT RIGHT THERE. THANK YOU. SO, IN THE COURSE OF
14 THIS PAY PANEL, YOU CONSIDERED EACH OF THE ANESTHESIOLOGISTS;
15 IS THAT CORRECT?

16 A YES.

17 Q DID YOU CONSIDER THEM ONE AT A TIME OR AS A GROUP?

18 A INDIVIDUALLY.

19 Q INDIVIDUALLY. OKAY. AND YOU CONSIDERED EACH ONE OF
20 THEM IN REFERENCE TO THESE SEVEN FACTORS; IS THAT CORRECT?

21 A YES, SIR.

22 Q AND YOU ARRIVED AT A RECOMMENDATION OF PAY OF \$300,000.

23 A YES.

24 Q AND THIS IS A RECOMMENDATION THAT WAS BROUGHT TO YOU BY
25 THE SERVICE LINE CHIEF; CORRECT?

1 A YES.

2 Q IN FACT, THIS INFORMATION INVOLVING THE DIFFERENT
3 FACTORS, WHAT SUPPORTED THE RECOMMENDATION, THAT WOULD HAVE
4 BEEN PRESENTED TO YOU BY THE SERVICE LINE CHIEF; CORRECT?

5 A CORRECT.

6 Q IS THERE ANYTHING DIFFERENT ABOUT WHAT HAPPENED HERE
7 WITH THESE ANESTHESIOLOGISTS THAN WHAT YOU MIGHT HAVE SEEN IN
8 A PAY PANEL FOR A DOCTOR WITH A DIFFERENT SPECIALTY?

9 A NO, SIR.

10 Q OKAY. IF IN EVALUATING THESE FACTORS AND APPLYING THEM
11 TO EACH ONE OF THESE DOCTORS YOU ARRIVED AT THE SAME ANNUAL
12 PAY, IS IT FAIR TO SAY THAT THEY WERE SIMILARLY QUALIFIED?

13 A YES, SIR.

14 Q DO YOU BELIEVE THAT IT'S FAIR TO PAY SIMILARLY-QUALIFIED
15 DOCTORS THE SAME AMOUNT OF ANNUAL PAY?

16 A YES.

17 Q DO YOU BELIEVE IT WOULD BE FAIR TO PAY ONE OF THESE
18 DOCTORS 20 TO \$30,000 MORE THAN ANY ONE OF THE OTHERS IF THEY
19 ARE SIMILARLY QUALIFIED?

20 A NO, SIR.

21 Q OKAY. I'D LIKE TO DRAW YOUR ATTENTION TO THIS SENTENCE
22 RIGHT HERE ON THE DOCUMENT WE ARE LOOKING AT. AND BELIEVE
23 THIS IS COPIED ON EVERY ONE OF THE COMPENSATION PANEL ACTIONS
24 WE DISCUSSED. IT SAYS, THE ANESTHESIOLOGY SERVICE IS
25 CONDUCTING A REVIEW OF PROVIDERS' PAY TO ENSURE THERE IS NO

1 PAY DISPARITY. DO YOU SEE THAT?

2 A I DO.

3 Q DO YOU BELIEVE THERE IS ANYTHING WRONG WITH ELIMINATING
4 PAY DISPARITY FOR DOCTORS WHO ARE SIMILARLY QUALIFIED?

5 A NO.

6 Q IN YOUR TIME ON THESE PANELS, DID YOU TAKE YOUR ROLE
7 SERIOUSLY?

8 A YES, SIR.

9 Q DID YOU CONSIDER THE INFORMATION THAT WAS PRESENTED TO
10 YOU?

11 A YES.

12 Q IF YOU HAD DISAGREED WITH THE RECOMMENDATION OF THE
13 SERVICE LINE CHIEF, WOULD YOU HAVE APPROVED THE
14 RECOMMENDATION?

15 A NO.

16 Q DID YOU DISAGREE WITH THE RECOMMENDATION OF THE SERVICE
17 LINE CHIEF HERE?

18 A NO, SIR.

19 Q DO YOU AGREE WITH THE RECOMMENDATIONS YOU MADE FOR EACH
20 OF THESE DOCTORS?

21 A YES.

22 Q WOULD YOU HAVE APPROVED ANY COMPENSATION PANEL
23 RECOMMENDATION FOR ANNUAL PAY IF YOU THOUGHT IT WAS
24 DISCRIMINATORY TO OLDER DOCTORS AT THE VA HOSPITAL?

25 A NO.

1 Q IN ANY SPECIALTY?

2 A NO.

3 Q I DON'T HAVE ANY FURTHER QUESTIONS. THANK YOU. OH, I'M
4 SORRY. JUST TO CLEAR THIS UP. I THINK THERE'S STILL AN OPEN
5 QUESTION ABOUT THIS IN THE RECORD, SO I THINK IT WOULD BE
6 USEFUL FOR ALL OF US JUST TO GET AN ANSWER HERE. IF YOU
7 COULD GO HERE.

8 WE HAVE TALKED A LOT ABOUT THESE PARAGRAPHS BOTH FOR DR.
9 KENNEDY AND FOR DR. ALGHOOTHANI, BUT I BELIEVE THEY'RE IN THE
10 RECORD FOR EVERY ONE OF THE ANESTHESIOLOGISTS. DO YOU KNOW
11 WHO PREPARED THESE PARTICULAR PARAGRAPHS?

12 A I DO NOT.

13 Q OKAY. THANK YOU.

14 MR. IRVIN: NOTHING FURTHER OF THIS WITNESS, YOUR
15 HONOR.

16 THE COURT: THANK YOU. YOU ARE EXCUSED. YOU CAN
17 STEP DOWN.

18 (WITNESS LEFT THE STAND.)

19 THE COURT: CALL YOUR NEXT WITNESS.

20 MR. IRVIN: IF YOUR HONOR PLEASE, AND CERTAINLY WE
21 WILL JUST DO -- JUST TO INFORM THE COURT SORT OF WHERE WE
22 ARE. WE ARE AT THE END OF THESE NOVEMBER 2016 PANEL MEMBERS.
23 WE HAVE TWO WITNESSES LEFT TO CALL. THE FIRST IS GOING TO BE
24 MRS. DOTY WHO HAS BEEN A REPRESENTATIVE FOR THE VA THROUGHOUT
25 THE TRIAL. AND WHILE I DON'T THINK I'M GOING TO BE AWFULLY

1 LONG WITH HER, DEPENDING ON WHAT SHE HAS TO SAY, I ANTICIPATE
2 THAT THE VA MAY SPEND SOME SUBSTANTIAL TIME WITH HER. AND I
3 CAN CERTAINLY START IF YOU WANT ME TO.

4 THE ONLY OTHER WITNESS THAT WE WILL CALL WOULD BE DR.
5 KENNEDY. AND SO WE'RE DOWN TO THOSE TWO. AND I CERTAINLY
6 ANTICIPATE THAT WE CAN FINISH BOTH OF THOSE WITNESSES THIS
7 AFTERNOON, AND SO -- AND AS I UNDERSTAND IT FROM TALKING WITH
8 MR. ANDREWS, THEY DO NOT ANY LONGER INTEND TO USE THEIR
9 WITNESS DR. JORGENSEN, AND SO AS FAR AS I KNOW THEY DON'T
10 HAVE ANY OTHER WITNESSES.

11 THE COURT: ALL RIGHT.

12 MR. ANDREWS: THAT'S CORRECT, YOUR HONOR. THESE
13 ARE THE ONLY TWO WITNESSES LEFT. WE ARE HAPPY TO PROCEED AND
14 DEFER TO YOUR HONOR IN TERMS OF...

15 THE COURT: ALL RIGHT. IT'S 12:00 NOW, SO WE CAN
16 BREAK FOR LUNCH NOW AND COME BACK AT 1:00 AND THEN START WITH
17 MRS. DOTY AT 1:00.

18 MR. IRVIN: THANK YOU, YOUR HONOR.

19 MR. ANDREWS: THANK YOU.

20 (COURT IN RECESS FOR LUNCH.)

21 THE COURT: ALL RIGHT. MR. IRVIN, YOU MAY CALL
22 YOUR NEXT WITNESS.

23 MR. IRVIN: THANK YOU, YOUR HONOR. WE CALL DEBORAH
24 DOTY.

25 DEBORAH DOTY, AFTER BEING DULY SWORN,

1 TESTIFIED AS FOLLOWS:

2 DIRECT EXAMINATION

3 BY MR. IRVIN:

4 Q GOOD AFTERNOON, MRS. DOTY.

5 A HI.

6 Q WE SPOKE EARLIER. I'M WILMOT IRVIN AND I THINK YOU
7 REMEMBER THAT WE TOOK YOUR DEPOSITION BY VIDEO HOOK-UP
8 THROUGH THE VA OFFICES HERE IN COLUMBIA A COUPLE OF YEARS
9 AGO. DO YOU RECALL THAT?

10 A YES, I DO.

11 Q OKAY. AND YOU UNDERSTAND I REPRESENT DR. KENNEDY IN
12 THIS CASE?

13 A YES.

14 Q AND I BELIEVE YOU HAD THE OPPORTUNITY AS THE CLIENT
15 REPRESENTATIVE TO BE ABLE TO SIT IN THE COURTROOM AND HEAR
16 ALL THE TESTIMONY DURING THE TRIAL; IS THAT RIGHT?

17 A YES.

18 Q OKAY. ALL RIGHT. LET'S START AND JUST TALK A LITTLE
19 BIT ABOUT WHO YOU ARE AND WHAT YOUR POSITION IS AND YOUR
20 RESPONSIBILITIES. ARE YOU CURRENTLY EMPLOYED WITH THE VA?

21 A YES, I AM.

22 Q OKAY. AND WHEN I TOOK YOUR DEPOSITION I BELIEVE YOU
23 SAID THAT YOU WERE A SENIOR POLICY ADVISER FOR THE TITLE 38
24 PAY SYSTEM. IS THAT STILL YOUR ROLE?

25 A YES.

1 Q OKAY. AND YOU ARE WITH THE OFFICE OF HR MANAGEMENT IN
2 THE VA CENTRAL OFFICE IN WASHINGTON DC; IS THAT CORRECT?

3 A I AM STILL IN CENTRAL OFFICE BUT I NOW WORK IN VHA WITH
4 WORK FORCE MANAGEMENT AND CONSULTING IN THE HR CENTER OF
5 EXPERTISE.

6 Q OKAY. HOW HAVE YOUR DUTIES AND RESPONSIBILITIES CHANGED
7 SINCE YOU MADE THAT CHANGE?

8 A NOT VERY MUCH AT ALL.

9 Q OKAY. WHAT IS THE DIFFERENCE BETWEEN VA AND VHA?

10 A VHA IS ONE OF THE THREE ADMINISTRATIONS IN THE MORE
11 GLOBAL VETERAN'S AFFAIRS.

12 Q OKAY. NOW, DO YOU STILL HAVE RESPONSIBILITIES AS A
13 SENIOR POLICY ADVISER FOR TITLE 38 PAY SYSTEMS?

14 A YES, I DO.

15 Q AND YOU UNDERSTAND THAT TITLE 38 REFERS TO THE UNITED
16 STATES CODE, TITLE 38; IS THAT RIGHT?

17 A YES.

18 Q OKAY. AND I BELIEVE THAT YOU ARE FAMILIAR WITH THE
19 STATUTE THAT TITLE 38 CONTAINS THAT APPLIES TO PAY FOR
20 PHYSICIANS AND DENTISTS BEING TITLE 38, SECTION 7431.

21 A YES.

22 Q IS THAT A FAIR STATEMENT?

23 A YES.

24 Q OKAY. AND I MAY -- MAY BE REFERRING TO THAT. I MAY
25 NOT. I HAVEN'T DECIDED YET. BUT ANY WAY, JUST WE DID NOT

1 MARK IT AS AN EXHIBIT, BUT I WILL JUST GIVE YOU A COPY OF
2 WHAT I HAVE. AND I'M GOING TO TELL YOU, SUBJECT TO BEING
3 CORRECTED, THAT I BELIEVE THAT IT IS THE VERSION OF THAT
4 SECTION OF THE STATUTE THAT IS APPLICABLE TO THE TIME PERIOD
5 IN QUESTION. AND IF I'M WRONG ABOUT THAT, PLEASE CORRECT ME.
6 BUT, SO YOU HAVE AT LEAST SOME GENERAL FAMILIARITY WITH THE
7 STATUTE; IS THAT RIGHT?

8 A YES. I'M VERY FAMILIAR WITH THE STATUTE.

9 Q BUT WOULD IT BE FAIR TO SAY THAT IN YOUR DAY TO DAY
10 DUTIES AND RESPONSIBILITIES YOU REFER MORE OFTEN TO THE VA
11 HANDBOOK?

12 A I ACTUALLY WROTE A LOT OF THE VA HANDBOOK, BUT I STILL
13 USE THE STATUTE OFTEN.

14 Q OKAY. VERY GOOD. ALL RIGHT. SO YOU USE THEM BOTH.

15 A YES.

16 Q OKAY. AND JUST TELL US, IF YOU WOULD, IN YOUR OWN WORDS
17 HOW YOU WOULD DESCRIBE YOUR RESPONSIBILITIES AS THEY RELATE
18 TO PAY FOR PHYSICIANS AT VA MEDICAL FACILITIES.

19 A I, AS THE SENIOR -- AS ONE OF SEVERAL SENIOR HR
20 SPECIALISTS WHO SPECIALIZE IN TITLE 38 COMPENSATION, I WORK
21 INTRICATELY WITH VHA PHYSICIAN AND DENTIST PAY. I HAVE
22 WRITTEN MOST OF THE POLICY REVISIONS THAT HAVE OCCURRED SINCE
23 WE IMPLEMENTED THIS NEW PAY SYSTEM IN 2006. AND WHEN I SAY
24 POLICY REVISIONS I'M REFERRING TO VA HANDBOOK 5007 PART NINE.

25 Q ALL RIGHT. AND COULD I JUST INTERRUPT YOU THERE FOR A

1 MOMENT? AND I'M GOING TO HAND YOU WHAT'S ALREADY IN EVIDENCE

2 --

3 A OKAY.

4 Q -- AS PLAINTIFF'S EXHIBIT 1. AND I BELIEVE THIS WOULD
5 BE PART NINE.

6 A YES.

7 Q PLEASE TAKE A LOOK AND CONFIRM THAT THAT IS WHAT YOU
8 JUST MADE REFERENCE TO AS THE VA HANDBOOK AS IT RELATES IN
9 PART NINE --

10 A YES.

11 Q -- TO PAY FOR VA, VHA PHYSICIANS.

12 A CORRECT. SO, I -- I HAVE WRITTEN A LOT OF THE POLICY
13 REVISIONS NOT ONLY TO PART NINE, WHICH IS THE HANDBOOK
14 THAT -- OR THE POLICY -- THE CHAPTER THAT COVERS PHYSICIAN
15 AND DENTIST PAY, BUT I'VE ALSO DONE MANY REVISIONS TO THE
16 POLICY AND OTHER TITLE 38 CHAPTERS AS WELL COVERING NURSE
17 LOCALITY PAY, THINGS OF THAT NATURE.

18 I SERVE AS A MEMBER ON THE VHA PHYSICIAN AND DENTIST
19 STEERING COMMITTEE WHICH IS A COMMITTEE THAT IS REQUIRED TO
20 MEET ONCE EVERY TWO YEARS. THAT COMMITTEE MAKES
21 RECOMMENDATIONS TO THE SECRETARY. THE SECRETARY IN TITLE 38
22 STATUTE IS REQUIRED TO REVIEW SURVEY DATA -- I'M SORRY --
23 SALARY SURVEY DATA EVERY 24 MONTHS OR EVERY TWO YEARS AND
24 MAKE RECOMMENDATIONS AS FAR AS -- I'M SORRY.

25 THE SECRETARY HAS TO APPROVE MINIMUM AND MAXIMUM RATES

1 OF PAY FOR PHYSICIANS AND DENTISTS EVERY 24 MONTHS. AND THE
2 WAY IN VA WE DO THAT, A VHA STEERING COMMITTEE MEETS,
3 CONVENES FOR THREE DAYS AND MAKES RECOMMENDATIONS TO THE
4 SECRETARY, SO I HAVE BEEN INCLUDED ON AT LEAST FOUR OF THE --
5 OVER THE PAST EIGHT YEARS FOUR DIFFERENT STEERING COMMITTEES
6 TO MAKE THOSE FORMAL RECOMMENDATIONS AS FAR AS ANNUAL PAY
7 RANGES TO THE SECRETARY.

8 Q AND THOSE ARE THE ANNUAL PAY RANGES THAT YOU MENTIONED,
9 THE MAXIMUMS AND THE MINIMUMS, FOR VA PHYSICIANS.

10 A YES, THE ONES THAT ARE PUBLISHED ON THOSE ANNUAL PAY
11 RANGE DOCUMENTS THAT SHOWS THE DIFFERENT CLINICAL ALIGNMENT
12 OF SPECIALTIES AND TIERS AND TABLES THAT -- THE PAY TABLES
13 AND THE TIERS.

14 Q RIGHT. AND SOME OF THOSE ARE IN THE RECORD AND IN THESE
15 DOCUMENTS THAT WE HAVE PUT INTO EVIDENCE ON BOTH SIDES, I
16 THINK. BUT JUST WHILE WE'RE ON THAT SUBJECT OF THE MINIMUMS
17 AND MAXIMUMS, THOSE PAY RANGES, IT'S MY UNDERSTANDING THAT
18 THERE ARE OFFICIALS WITHIN THE VA SYSTEM WHO HAVE AUTHORITY
19 TO GRANT EXCEPTIONS TO THE MAXIMUMS. IS THAT A CORRECT
20 STATEMENT?

21 A YES.

22 Q AND WOULD ONE OF THOSE PERSONS BE THE FACILITY -- FOR
23 EXAMPLE, HERE IN COLUMBIA, THE DORN VA FACILITY -- DIRECTOR
24 OR THE HEAD PERSON THERE AT THE LOCAL FACILITY?

25 A THE DIRECTOR HAS SOME DISCRETION TO SET OR TO -- TO

1 AUTHORIZE A PAY EXCEPTION UP TO A CERTAIN AMOUNT. THE
2 NETWORK DIRECTOR ALSO HAS -- CAN APPROVE HIGHER RATES AND
3 THEN THERE'S ALSO A CAVEAT THAT THE UNDERSECRETARY FOR HEALTH
4 CAN APPROVE PAY EXCEPTIONS.

5 Q OKAY. AND SO YOU HAVE GOT THE LOCAL DIRECTOR THAT HAS
6 SOME AUTHORITY UNDER SOME CIRCUMSTANCES TO GRANT EXCEPTIONS
7 TO THE MAXIMUM; CORRECT?

8 A YES.

9 Q AND THEN YOU HAVE WHAT YOU PROBABLY HAVE HEARD AT LEAST
10 ME REFER TO AS THE VISN DIRECTOR -- IN OUR CASE I BELIEVE
11 THAT PERSON'S LOCATED IN ATLANTA; IS THAT RIGHT?

12 A THAT'S CORRECT.

13 Q AND THAT IS ESSENTIALLY A REGIONAL DIRECTOR OVER THIS
14 PAY PROCESS; IS THAT RIGHT?

15 A CORRECT.

16 Q AND THAT INDIVIDUAL WOULD BE THE AUTHORIZING OFFICIAL OR
17 THE APPROVING OFFICIAL TO GRANT AN EXCEPTION ABOVE THE
18 LIMITATION THAT -- THE PAY RANGE MAXIMUM AND PERHAPS IN SOME
19 CASES EVEN ABOVE WHAT THE LOCAL DIRECTOR HIMSELF OR HERSELF
20 COULD GRANT. IS THAT A FAIR STATEMENT?

21 A THAT'S CORRECT.

22 Q OKAY. AND THEN ABOVE EVEN THE VISN OR REGIONAL DIRECTOR
23 THERE IS AUTHORITY UNDER THE STATUTE TO ENABLE THE
24 UNDERSECRETARY, AND I'M NOT SURE UNDERSECRETARY OF WHAT RIGHT
25 AT THE MOMENT, BUT THE UNDERSECRETARY THAT HAS RESPONSIBILITY

1 FOR VA PHYSICIAN PAY --

2 A VHA, YES.

3 Q -- COULD GRANT EVEN A HIGHER EXCEPTION; IS THAT CORRECT?

4 A THAT'S CORRECT.

5 Q DO YOU HAPPEN TO KNOW, COULD YOU TELL US FOR THE TIME
6 PERIOD IN QUESTION HERE WHAT THOSE MAXIMUMS ARE FOR
7 ANESTHESIOLOGISTS SUCH AS DR. KENNEDY AND THEN WHAT THE
8 EXCEPTION LIMITS OR LEVELS WOULD BE FOR AN ANESTHESIA, STAFF
9 ANESTHESIOLOGIST AT DORN VA, OVER THIS PERIOD.

10 A WELL, JANUARY 10TH, 2016 THE APPROVED ANNUAL PAY RANGES
11 FOR PHYSICIANS AND DENTISTS, ANESTHESIOLOGY WAS ON PAY TABLE
12 FOUR, AND THE MAX FOR TIER ONE, WHICH COVERS STAFF
13 PHYSICIANS, WAS 325.

14 Q OKAY. AND THAT WOULD HAVE BEEN IN EFFECT UNTIL WHAT
15 DATE?

16 A THAT WAS IN EFFECT UNTIL THE TABLE WAS INCREASED
17 PROBABLY THE NEXT YEAR. I DON'T HAVE THE NEXT TABLE FOR SOME
18 REASON.

19 Q I'M GOING TO...

20 A ACTUALLY I KNOW BY MEMORY. THAT WAS -- THAT
21 JANUARY 10TH, 2016 PAY TABLE WAS IN EFFECT UNTIL NOVEMBER OF
22 2016, AND THERE WAS A CHANGE TO THE PAY TABLE NOVEMBER 2016
23 BASED ON THE SECRETARY'S APPROVAL OF THE VHA PHYSICIAN AND
24 DENTIST STEERING COMMITTEE'S RECOMMENDATION.

25 Q ALL RIGHT. AND WHAT WAS IT CHANGED TO?

1 A I DON'T HAVE THAT PAY CHART IN FRONT OF ME.

2 Q LET ME SHOW YOU--

3 A PAY TABLE.

4 Q LET ME SHOW YOU WHAT WE'VE MARKED AS -- AND INTRODUCED
5 AS PLAINTIFF'S EXHIBIT 4. I'M NOT SURE THAT WILL ANSWER YOUR
6 QUESTIONS, BUT TAKE A MOMENT TO LOOK THROUGH IT. AND I
7 BELIEVE THE TESTIMONY OF MRS. NICHOLS WAS THAT SHE WROTE THAT
8 MEMORANDUM. AND THEN THERE ARE SOME OTHER DOCUMENTS
9 ATTACHED. BUT IF THAT DOESN'T HELP YOU, YOU CAN--

10 A THIS DOESN'T HELP ME. IT DOESN'T. I... I'M -- THERE IS
11 A ANNUAL PAY RANGE PAY TABLE THAT PROVIDES ALL THE CLINICAL
12 SPECIALTIES, THE PAY TABLES AS WELL AS THE NEW APPROVED
13 MAXIMUM RATES THAT'S DATED I BELIEVE NOVEMBER 14TH, 2016.

14 Q OKAY. LET ME -- WELL, YOU FINISH UP LOOKING AT THAT TO
15 SEE IF ANY OF THAT IS ANY ASSISTANCE TO YOU.

16 A THIS DOESN'T TELL ME THE MAXIMUMS. THIS IS A --
17 ATTACHED IS A COPY OF THE INTERIM UNDERSECRETARY FOR HEALTH.
18 IT'S THE -- A PAY DELEGATION MEMO THAT WAS AUTHORIZED BY THE
19 ACTING UNDERSECRETARY FOR HEALTH AT THE TIME. SO THIS
20 DOCUMENT OUTLINES THE NEW PAY RANGES THAT CAN BE APPROVED AT
21 WHAT LEVEL BUT IT DOESN'T SPECIFICALLY TELL ME WHAT THE
22 MAXIMUM RATES ON THOSE TABLE -- THAT NEW TABLE --

23 Q OKAY.

24 A -- WHAT THOSE RATES ARE.

25 Q THAT'S FINE. WELL, YOU TOLD US THAT THE MAXIMUM AS OF I

1 THINK YOU SAID JANUARY 2016 WAS 325,000; IS THAT RIGHT?

2 A YES. YES.

3 Q AND THEN IN NOVEMBER OF 2016 IT INCREASED TO WHAT?

4 A I DON'T HAVE THAT TABLE IN FRONT OF ME.

5 Q THAT'S WHAT YOU DON'T RECALL. BUT IT WOULD HAVE BEEN
6 SOME -- SOME LEVEL ABOVE 325,000.

7 A THAT'S CORRECT.

8 Q OKAY. AND THEN THAT WOULD BE WHERE THE EXCEPTIONS WOULD
9 COME IN. THAT IS, FOR EXAMPLE, IN MOST OF THE CALENDAR YEAR
10 2016 THESE EXCEPTIONS AND THE APPROPRIATE OFFICIALS THAT CAN
11 GRANT EXCEPTIONS WOULD BE ABLE TO APPROVE A PHYSICIAN'S
12 RECOMMENDED ANNUAL PAY OR ANNUAL SALARY ABOVE \$325,000 AND UP
13 TO WHATEVER THE LIMIT IS THAT THAT OFFICIAL HAS; CORRECT?

14 A CORRECT.

15 Q AND AGAIN, THAT WOULD BE A LEVEL FOR THE LOCAL DIRECTOR
16 FIRST ABOVE 325 AND THEN A LEVEL FOR THE VISN DIRECTOR ABOVE
17 THE LOCAL DIRECTOR'S AUTHORITY, AND THEN THE UNDERSECRETARY
18 HAS A FURTHER CAPACITY, IF YOU WILL, TO APPROVE A SALARY EVEN
19 ABOVE THAT.

20 A THAT'S CORRECT.

21 Q THAT RIGHT? OKAY. PRIOR TO 2016 DO YOU JUST RECALL
22 FROM YOUR MEMORY FOR THE PARTICULAR -- FOR THE
23 ANESTHESIOLOGIST -- STAFF ANESTHESIOLOGISTS WHAT THE MAXIMUMS
24 WERE?

25 A PRIOR TO THE PAY TABLE DATED JANUARY 10TH, 2016, THE ONE

1 PRIOR TO THAT WAS DATED JANUARY 11TH, 2015, AND THE MAXIMUM
2 WAS STILL 325 FOR TIER ONE.

3 Q OKAY. AND HOW ABOUT PRIOR TO THAT DATE?

4 A PRIOR TO THAT DATE THE PAY TABLE WAS EFFECTIVE
5 NOVEMBER 30TH, 2014, AND IT WAS 325. THE MAXIMUM WAS 325 PER
6 PAY TABLE FOUR.

7 Q OKAY. AND DO YOU KNOW WHAT IT WAS PRIOR TO THAT?

8 A PRIOR TO THAT WAS A TABLE THAT WAS EFFECTIVE
9 JANUARY 12TH, 2014 AND THAT WAS 295.

10 Q ALL RIGHT. AND PRIOR TO THAT DATE?

11 A I DON'T HAVE THAT.

12 Q OKAY. ALL RIGHT. THANK YOU. I GOT US OFF TRACK
13 BECAUSE WE WERE TALKING ABOUT YOUR DUTIES AND
14 RESPONSIBILITIES RELATIVE TO VA PHYSICIAN PAY AND YOU
15 MENTIONED THOSE MAXIMUMS AND I THOUGHT IT OPPORTUNE MAYBE
16 JUST TO ASK YOU ABOUT THAT.

17 WHAT ARE YOUR OTHER DUTIES AND RESPONSIBILITIES WITH
18 RESPECT TO PHYSICIAN -- VA PHYSICIAN PAY?

19 A I DO TRAINING ON IT AT THE BOTH FACILITY AND STATION
20 MEDICAL CENTER LEVELS. I HAVE RECENTLY BEEN RESPONSIBLE FOR
21 WRITING NEW LEGISLATIVE PROPOSALS ON DESIRED CHANGES THAT VHA
22 WOULD LIKE TO MAKE TO ENHANCE THE PROGRAM, THAT PARTICULAR
23 PAY PROGRAM.

24 Q OKAY. AND--

25 A I WAS GOING TO SAY I HAVE BEEN IN A -- RECENTLY I HAVE

1 BEEN IN A VERY LENGTHY REVIEW OF COMPENSATION PANEL REVIEW
2 FORM PAY ACTIONS INCLUDING PHYSICIANS.

3 Q DOES THE VA CURRENTLY UTILIZE COMPENSATION PANELS?

4 A AS OF JUNE 7TH, 2018, NO.

5 Q OKAY. WERE YOU RESPONSIBLE FOR WRITING SOME OR ALL OF
6 THE POLICY THAT HANDLED THAT CHANGE?

7 A YES. BASED ON THE STATUTORY CHANGE, YES.

8 Q OKAY. ALL RIGHT. SO, YOU MENTIONED THAT YOU ALSO HAD
9 INVOLVEMENT IN TRAINING RELATIVE TO THE HANDBOOK AND ITS
10 PROVISIONS FOR PHYSICIAN PAY. IS THAT A FAIR STATEMENT?

11 A YES.

12 Q ALL RIGHT. AND YOU TRAINED HR PEOPLE?

13 A YES.

14 Q ALL RIGHT. AND THAT WOULD INCLUDE ON OCCASION COMING TO
15 LOCALITIES AND TRAINING HR DIRECTORS AT VARIOUS MEDICAL
16 CENTERS?

17 A YES.

18 Q OKAY. DO YOU EVER TRAIN PHYSICIANS?

19 A NO.

20 Q OKAY. ALL RIGHT. NOW, HAVE YOU TOLD US NOW PRETTY,
21 PRETTY MUCH WHAT YOUR JOB RESPONSIBILITIES ARE IN THE AREA OF
22 SENIOR POLICY ADVISER OR REALLY IN ANY CAPACITY THAT YOU
23 CURRENTLY HAVE AS IT RELATES TO VA PHYSICIAN COMPENSATION?

24 A I THINK SO.

25 Q OKAY. ALL RIGHT. NOW, YOU HAVE THE HANDBOOK THERE IN

1 FRONT OF YOU AND YOU INDICATED THAT YOU HAD ACTUALLY BEEN THE
2 AUTHOR OF SOME OF THE PROVISIONS OF PART NINE; IS THAT
3 CORRECT?

4 A THAT'S CORRECT.

5 Q WELL, COULD YOU JUST WALK US THROUGH AND TELL US WHAT
6 SECTIONS YOU AUTHORED THAT EVENTUALLY BECAME APPROVED AND A
7 PART OF THE VA HANDBOOK?

8 A I DON'T KNOW IF -- I WOULD HAVE TO LOOK BASED ON THE
9 CHANGES. LET ME SEE. I WORKED ON AT THE TOP OF EACH PAGE
10 WHERE IT SAYS VA HANDBOOK 5007 AND THERE'S A DASH AND THEN A
11 NUMBER.

12 Q OKAY.

13 A FOR EXAMPLE, ON--

14 Q YEAH. MINE HAS A SLASH AND --

15 A YES.

16 Q -- THEN A NUMBER.

17 A YES. I'M SORRY. SO ON PAGE 9-2, THAT REFERS TO CHANGE
18 47 AT THE TOP WHERE IT SAYS --

19 Q OH.

20 A -- VA HANDBOOK 5007/47.

21 Q YEAH.

22 A OKAY. SO THAT INDICATES THAT'S A CHANGE NUMBER THAT --
23 WE USE A SEQUENTIAL CHANGE EVERY TIME WE'RE MAKING A CHANGE
24 TO VA HANDBOOK 5007.

25 Q UH-HUH.

1 A I -- I DEVELOPED AND PUBLISHED CHANGE 47.

2 Q AND CHANGE 47 APPEARS WHERE ON THAT PAGE?

3 A WHEN YOU SEE BRACKETS AROUND TEXT THAT IS THE IDENT --
4 WAY WE IDENTIFY WHAT WE ARE CHANGING IN A POLICY. SO IF YOU
5 LOOK AT PARAGRAPH F, CHANGE IN ASSIGNMENT, THERE'S A BRACKET
6 THAT STARTS ON THE -- ABOUT THE MIDDLE OF THE SECOND
7 SENTENCE.

8 Q OKAY.

9 A THAT'S A CHANGE WE ADDED TO THAT PARAGRAPH.

10 Q ALL RIGHT. AND THAT WAS ONE OF YOUR -- YOU AUTHORED
11 THAT?

12 A YES.

13 Q OKAY. NOW WHAT ABOUT THE -- ON THAT SAME PAGE,
14 PARAGRAPH G, COMPENSATION PANEL. DID YOU AUTHOR THAT ONE?

15 A NO. THAT'S -- NO, THERE HASN'T BEEN A CHANGE TO THAT,
16 SO...

17 Q OKAY. AND I MEANT TO INCLUDE IF YOU -- YOU INDICATED
18 THAT YOU HAD WRITTEN A LOT OF THE HANDBOOK --

19 A SURE.

20 Q -- AND I DIDN'T KNOW IF MAYBE YOU HAD WRITTEN THAT ONE.

21 A I THINK THAT'S BEEN THE SAME SINCE THE INCEPTION OF THIS
22 NEW PAY SYSTEM IN 2006.

23 Q OKAY. AND IS THAT A PROVISION THAT IS NO LONGER IN THE
24 HANDBOOK DUE TO THE CHANGE THAT HAS BEEN MADE REGARDING
25 COMPENSATION PANELS?

1 A THAT'S CORRECT. IT'S BEEN TAKEN OUT.

2 Q OKAY. NOW -- ALL RIGHT. AND DID YOU WANT TO -- LET ME
3 ASK IT THIS WAY. CAN YOU DIRECT OUR ATTENTION TO ANY OTHER
4 CHANGES IN THE VA HANDBOOK OR ANY OTHER PROVISIONS THAT YOU
5 AUTHORED, ORIGINAL OR MODIFICATIONS, THAT YOU BELIEVE ARE
6 PERTINENT TO WHAT YOU HAVE BEEN LISTENING TO IN THE COURTROOM
7 HERE THE LAST TWO DAYS?

8 A I'D HAVE TO GO PAGE BY PAGE.

9 Q NOTHING COMES TO MIND?

10 A I -- NOTHING COMES TO MIND, BUT I'D HAVE TO LOOK BACK TO
11 SEE. I WRITE A LOT OF POLICY.

12 Q WELL, THAT--

13 A SO I...

14 Q SORRY. I DIDN'T MEAN TO INTERRUPT YOU.

15 A NO, I SAID I'D HAVE TO GO THROUGH AND LOOK AT ALL THE
16 BRACKETS AND SEE IF I CAN REMEMBER IF IT WAS A PART OF THE
17 POLICY THAT I ACTUALLY DEVELOPED AND PUBLISHED.

18 Q WHY DON'T WE DO IT THIS WAY. WE WILL RUN THROUGH SOME
19 OF THE PROVISIONS IN THE HANDBOOK --

20 A OKAY.

21 Q -- AS I THINK WE MAY HAVE SOME PERTINENCE TO US. AND IF
22 WE BUMP INTO SOME BRACKETS OR IF WE HIT A PROVISION AND YOU
23 RECALL THAT I WROTE THIS ONE OR THAT I MODIFIED THIS ONE, YOU
24 CAN LET US KNOW THAT. HOW ABOUT THAT?

25 A OKAY.

1 Q OKAY. NOW, WOULD YOU AGREE WITH ME THAT THE VA HANDBOOK
2 IS TO CONFORM TO THE STATUTE, THE FEDERAL STATUTE?

3 A YES.

4 Q ALL RIGHT. AND IF THERE WAS ANY CONFLICT IN THE
5 HANDBOOK OR BETWEEN THE HANDBOOK AND THE STATUTE, DO YOU
6 BELIEVE THE HAND -- THE STATUTE SHOULD CONTROL?

7 A YES.

8 Q OKAY. ALL RIGHT. NOW, LOOK AT THE BOTTOM OF PAGE --
9 I'M GOING TO SAY KENNEDY VA 813, WHICH IS THE BATES LEGEND
10 DOWN AT THE BOTTOM OF THE PAGE. ARE YOU FAMILIAR WITH THE
11 BATES LEGEND?

12 A YES, I AM.

13 Q ALL RIGHT. AND IF YOU LOOK DOWN AT THE BOTTOM OF THAT
14 PAGE, THERE IS -- THAT'S THE DEFINITION SECTION THERE. AND B
15 IS ANNUAL PAY. DO YOU SEE THAT?

16 A I DO.

17 Q OKAY. AND THIS SAYS THE SUM OF THE BASE PAY RATE AND
18 MARKET PAY. AND SO, WE HAVE BEEN TALKING A LOT HERE IN THE
19 COURTROOM SAYING ANNUAL PAY IS THE SUM OF BASE PAY AND MARKET
20 PAY. SO YOU AGREE WITH THAT.

21 A I DO.

22 Q ALL RIGHT. AND THAT IS GENERALLY UNDERSTOOD WITHIN THE
23 VA'S HR DEPARTMENTS AND WITH RESPECT TO PHYSICIAN
24 COMPENSATION.

25 A YES.

1 Q AND YOU HAVE SEEN THE VARIOUS FORMS THAT WE HAVE BEEN
2 SHOWING ALL THESE PANEL -- DOCTOR PANEL MEMBERS, THOSE
3 COMPENSATION PAY ACTION REVIEW FORMS, AND YOU'RE FAMILIAR
4 WITH THOSE; IS THAT RIGHT?

5 A YES.

6 Q OKAY. AND THOSE FORMS, WERE THEY CREATED IN WASHINGTON
7 AND SENT OUT TO ALL OF THE VARIOUS LOCALITIES OR WAS THAT
8 FORM SOMETHING SPECIFIC TO DORN?

9 A THAT IS A -- THE FORM -- THE COMPENSATION PANEL FORMS
10 WERE -- ARE STANDARD -- WERE STANDARD VA FORMS THAT WERE
11 CREATED AT THE TIME THAT THIS POLICY WAS FIRST PUBLISHED.

12 Q ALL RIGHT.

13 A SO IT IS A STANDARD VA FORM THAT'S USED BY ALL OF THE VA
14 MEDICAL CENTERS ACROSS THE COUNTRY.

15 Q OKAY. AND AS FAR AS YOU KNOW OR CAN TELL, THE ONE, THE
16 SPECIFIC ONE THAT THE DORN VA IS USING CONFORMS WITH THAT
17 STANDARD FORM; IS THAT CORRECT?

18 A YES.

19 Q OKAY. NOW, FLIP OVER TO KENNEDY VA 814. AND IN THE
20 DEFINITION SECTION YOU WILL SEE WHERE COMPENSATION PANEL IS
21 DEFINED. DO YOU SEE THAT?

22 A I DO.

23 Q ALL RIGHT. AND IT SAYS A GROUP OF PHYSICIANS OR
24 DENTISTS RESPONSIBLE FOR THE EVALUATION OF PHYSICIANS OR
25 DENTISTS IN MAKING RECOMMENDATIONS TO THE APPROVING -- I'M

1 SORRY -- OFFICIAL FOR ANNUAL PAY. DO YOU SEE THAT?

2 A I DO.

3 Q OKAY. DO YOU KNOW WHETHER YOU HAD ANYTHING TO DO WITH
4 WRITING THAT LANGUAGE OR MODIFYING IT AT ANY TIME?

5 A NO, I DON'T. I THINK, AGAIN, THIS HAS BEEN IN THE
6 ORIGINAL -- THIS ORIGINAL CHAPTER NINE SINCE THE INCEPTION OF
7 THE NEWER PAY SYSTEM SINCE 2006.

8 Q OKAY. AND COULD YOU TELL US WHERE IN THE STATUTE IT
9 AUTHORIZES THAT THE COMPENSATION PANEL MAKES THE
10 RECOMMENDATION ON ANNUAL PAY? WHERE DO YOU FIND THAT? IF
11 YOU COULD JUST POINT THAT OUT TO THE COURT, PLEASE.

12 A THE COMPENSATION PANEL, ALTHOUGH IT'S NOT REFERRED TO AS
13 A COMPENSATION PANEL IN THE STATUTE...

14 Q AND WHAT PORTION ARE YOU--

15 A THAT IS IN -- LET'S SEE. THIS IS... C UNDER MARKET PAY,
16 C, ROMAN NUMERAL -- WHAT IS THAT? SORRY. C? NO, IT'S III.
17 THE SECRETARY SHOULD TO THE EXTENT PRACTICABLE ENSURE THAT A
18 PANEL OR BOARD THAT INCLUDES PHYSICIANS OR DENTISTS WHO ARE
19 PRACTICING CLINICIANS AND DO NOT HOLD MANAGEMENT POSITIONS IN
20 THE MEDICAL FACILITY OF THE DEPARTMENT OF WHICH THE PHYSICIAN
21 OR DENTIST SUBJECT TO THE CONSULTATION IS EMPLOYED.

22 THE DETERMINATION OF THE AMOUNT OF MARKET PAY OF THE
23 PHYSICIAN SHALL TAKE INTO ACCOUNT. AND THEN IT CONTINUES
24 WITH THE SEVEN FACTORS.

25 Q OKAY.

1 MRS. BAILEY: EXCUSE ME. MR. IRVIN, DO YOU AN
2 EXTRA COPY OF THAT STATUTE?

3 MR. IRVIN: YES. I CERTAINLY DO. THANK YOU.
4 BY MR. IRVIN:

5 Q OKAY. NOW MRS. DOTY, WE GOT HERE -- BECAUSE I HAD ASKED
6 YOU TO POINT OUT IN THE STATUTE WHERE IT AUTHORIZES THE PAY
7 PANEL TO MAKE A RECOMMENDATION ON ANNUAL PAY AS OPPOSED TO
8 MARKET PAY.

9 A OKAY. I'M SORRY. YES. IT REFERS TO IT -- THE PANEL TO
10 RECOMMEND MARKET PAY.

11 Q RIGHT. SO THAT'S WHAT THE STATUTE SAYS IS THAT THE
12 PANEL -- AND I'M NOW GOING TO READ FROM IT I BELIEVE IN THE
13 SECTION THAT -- WHERE YOU WERE. AND THIS, YOUR HONOR, IS
14 UNDER THE SECTION C, MARKET PAY.

15 AND PARAGRAPH 4V WHERE IT SAYS, IN DETERMINING THE
16 AMOUNT OF THE MARKET PAY FOR A PARTICULAR PHYSICIAN OR
17 DENTIST UNDER THIS SUBSECTION -- AND THEN I'M GOING TO SKIP A
18 TIER BECAUSE I DON'T THINK THAT'S RELEVANT -- BUT THE
19 SECRETARY SHALL CONSULT WITH AND CONSIDER THE RECOMMENDATIONS
20 OF AN APPROPRIATE PANEL. IS THAT WHAT YOU WERE SAYING A
21 MINUTE AGO?

22 A YES.

23 Q AND THAT WOULD BE IN THIS CASE, THESE COMPENSATION
24 PANELS.

25 A CORRECT.

1 Q AND SO, THE STATUTE AUTHORIZES THE PANEL TO MAKE A
2 RECOMMENDATION ON MARKET PAY; IS THAT CORRECT?

3 A CORRECT.

4 Q AND THEN YOU WENT ON DOWN FURTHER TO SUB-PARAGRAPH FIVE
5 AND YOU BEGAN TO READ WHAT I THINK IS WHAT WE ARE ALL -- WE
6 ALL SORT OF CALL THE FACTORS SUB-PARAGRAPH AND THAT IS WHERE
7 IT SAYS, THE DETERMINATION OF THE AMOUNT OF MARKET PAY --

8 A CORRECT.

9 Q -- OF A PHYSICIAN OR DENTIST. AND THEN IT SAYS, SHALL
10 TAKE INTO ACCOUNT. DO YOU SEE THAT THERE?

11 A I DO.

12 Q ALL RIGHT. AND SO, THAT AGAIN IS REFERRING TO A
13 DETERMINATION OF MARKET PAY, NOT ANNUAL PAY; CORRECT?

14 A CORRECT.

15 Q OKAY. AND THEN THERE ARE THE SEVERAL FACTORS THERE.
16 AND DO YOU BELIEVE THAT YOUR FORM THAT YOU USE -- I'M
17 SORRY -- THE HANDBOOK, THE VA HANDBOOK THAT YOU HAD A HAND IN
18 WRITING, GENERALLY CONFORMS WITH THOSE FACTORS?

19 A YES.

20 Q OKAY. I THINK IF WE WERE TO TAKE THE TIME TO KIND OF GO
21 DOWN THEM, WE WOULD SEE ACTUALLY THAT THERE IS AN ADDITIONAL
22 ONE IN THE HANDBOOK THAT IS NOT NECESSARILY IN -- NOT IN THE
23 STATUTE, BUT NEVERTHELESS IT'S THERE AND IT'S CONSIDERED, AND
24 THAT ONE IS THE ACCOMPLISHMENTS OF THE PHYSICIAN IN THE
25 SPECIALTY, AND THAT IS PARAGRAPH NUMBER FIVE IN YOUR

1 HANDBOOK.

2 AND YOUR HONOR, I'M NOW LOOKING AT KENNEDY VA 821 AND
3 COMPARING THAT LIST OF FACTORS TO THE LIST THAT'S IN THE
4 STATUTE.

5 AND MRS. DOTY, YOU CORRECT ME IF I'M WRONG, BUT I DON'T
6 THINK THAT THE LIST IN THE STATUTE INCLUDES NUMBER FIVE IN
7 THE HANDBOOK, WHICH IS THE ACCOMPLISHMENTS OF THE PHYSICIAN
8 IN THE SPECIALTY.

9 A YOU'RE CORRECT, BUT THE STATUTE ALLOWS OTHER SUCH
10 CONSIDERATIONS AS THE SECRETARY CONSIDERS APPROPRIATE.

11 Q THANK YOU. AND I DON'T HAVE A BIT OF QUARREL OR QUIBBLE
12 ABOUT THAT. I JUST WAS POINTING OUT THAT THERE'S BEEN AT
13 LEAST THAT ONE FACTOR ADDED. AND THEN IF YOU LOOK ON DOWN AT
14 SEVEN IN THE HANDBOOK IT SAYS, CONSIDERATION OF UNIQUE
15 CIRCUMSTANCES, QUALIFICATIONS, OR CREDENTIALS, ET CETERA.

16 AND AGAIN, THERE'S NOT A SPECIFIC ITEM IN THE STATUTE.
17 WOULD YOU AGREE WITH ME THERE?

18 A YES.

19 Q BUT AGAIN, YOU WOULD SAY THAT THAT MIGHT BE ANOTHER
20 CONSIDERATION THAT THE SECRETARY MIGHT HAVE AND GETS
21 IN-DRAFTED INTO THE HANDBOOK.

22 A YES.

23 Q OKAY. ALL RIGHT. BUT OKAY. SO LET'S CONTINUE TO LOOK
24 AT -- AND LET ME SAY THIS. AM I CORRECT THAT BOTH THE
25 STATUTE, THE PROVISIONS THAT WE JUST LOOKED AT FOR THE

1 DETERMINATION OF MARKET PAY AND THEN IT LISTS THE FACTORS
2 THAT SHALL BE TAKEN INTO ACCOUNT, BOTH THE STATUTE AND THE
3 HANDBOOK CONSISTENTLY SAY THAT THOSE FACTORS SHALL BE TAKEN
4 INTO ACCOUNT FOR THE DETERMINATION OF MARKET PAY?

5 A YES.

6 Q OKAY. ALL RIGHT. NOW, FLIP OVER TO KENNEDY VA 823 IF
7 YOU WOULD, PLEASE MA'AM. AND THIS IS THE PROVISION 10 ON
8 MARKET PAY ADJUSTMENTS FOR INDIVIDUAL PHYSICIANS.

9 A OKAY.

10 Q DID YOU WRITE ANY PART OF THIS OR MODIFY ANY PART OF
11 THIS ONE?

12 A PARAGRAPH B ON PAGE 824 I DID.

13 Q OKAY. AND IF THAT IS SOMETHING THAT YOU WANTED TO MAKE
14 A REFERENCE TO, YOU CERTAINLY CAN. I'M LOOKING AT A BECAUSE
15 MY QUESTION--

16 A OH, OKAY. I'M SORRY.

17 Q THAT'S ALL RIGHT, AND YOU CAN REFER TO B IF YOU'D LIKE.
18 BUT MY QUESTION TO YOU, THOUGH, IS DOES A SET FORTH IN THE
19 HANDBOOK THAT AT LEAST ONCE EVERY 24 MONTHS THE MARKET PAY OF
20 EACH PHYSICIAN IS REVIEWED BY AN APPROPRIATE COMPENSATION
21 PANEL?

22 A YES.

23 Q AND DO YOU BELIEVE THAT THAT IS CONSISTENT WITH THE
24 PROVISIONS OF THE STATUTE?

25 A YES.

1 Q OKAY. VERY GOOD. AND SO, THAT'S TALKING ABOUT THESE
2 REVIEWS THAT WE HAVE BEEN GOING OVER WHILE YOU HAVE BEEN IN
3 THE COURTROOM WITH US THAT RELATE TO PHYSICIANS THAT ARE NOT
4 BEING RECRUITED BUT WHO ARE ALREADY ON BOARD. AND SO EVERY
5 24 MONTHS AT LEAST THOSE PHYSICIANS ALREADY ON STAFF ARE TO
6 BE -- HAVE THEIR MARKET PAY REVIEWED. IS THAT A CORRECT --

7 A CORRECT.

8 Q -- STATEMENT? OKAY. AND THAT WOULD BE CONSISTENT WITH
9 THE STATUTE. IF YOU LOOK DOWN WHERE WE WERE IN THE STATUTE.

10 A YES.

11 Q IF YOU LOOK DOWN AT PARAGRAPH NUMBER SIX UNDER THE
12 MARKET PAY SECTION OF THE STATUTE IT SAYS, THE AMOUNT OF
13 MARKET PAY OF A PHYSICIAN SHALL BE EVALUATED BY THE SECRETARY
14 NOT LESS OFTEN THAN ONCE EVERY 24 MONTHS.

15 A CORRECT.

16 Q AND AGAIN, THAT IS A MARKET PAY DETERMINATION AND
17 EVALUATION, NOT AN ANNUAL PAY.

18 A CORRECT.

19 Q OKAY. ALL RIGHT. NOW, WHILE WE ARE ON PAGE KENNEDY VA
20 823, I NOTICED THAT THERE IS A NOTE UP TOWARDS THE TOP OF THE
21 PAGE THERE. AND DO YOU SEE WHERE I'M TALKING ABOUT? IT'S
22 SOME LANGUAGE IN ITALICS.

23 A YES.

24 Q AND THEN THERE'S A BRACKET THERE IN IT. BUT DID YOU
25 HAVE ANYTHING TO DO WITH THAT NOTE, WRITING IT, MODIFYING IT?

1 A I MODIFIED PART OF THAT WHERE IT SHOWS THE BRACKETS. I
2 DON'T KNOW THAT -- I DON'T THINK THAT I ORIGINALLY WROTE THIS
3 NOTE IN ITS ENTIRETY.

4 Q OKAY. AND THE NOTE, THE FIRST SENTENCE OF THE NOTE
5 SAYS, THE LAW -- AND THERE THAT'S REFERRING TO THE FEDERAL
6 STATUTE.

7 A CORRECT.

8 Q THE LAW REQUIRES THE COMPENSATION PANEL TO CONSIDER ALL
9 FACTORS.

10 A CORRECT.

11 Q AND THAT'S REFERRING AGAIN TO THE FACTORS THAT ARE IN
12 THE STATUTE WHICH THE VA HANDBOOK ATTEMPTS TO INCLUDE IN THE
13 HANDBOOK; IS THAT RIGHT?

14 A THAT'S CORRECT.

15 Q SO, IT'S FAIR TO SAY THEN THAT THE COMPENSATION PANEL IN
16 DOING ITS JOB OF REVIEWING EVERY 24 MONTHS, THE BIENNIAL
17 REVIEW, IS TO CONSIDER ALL THE FACTORS.

18 A CORRECT.

19 Q OKAY. ALL RIGHT. NOW, IN THE SECTION OF THE HANDBOOK
20 THAT YOU REFERRED TO JUST A LITTLE WHILE AGO IN TELLING US
21 ABOUT THAT, THOSE MAXIMUMS FOR STAFF ANESTHESIOLOGISTS OR
22 PHYSICIANS, IS THAT FOUND IN PART AT KENNEDY VA 831? AND I
23 AM LOOKING THERE AT PARAGRAPH D SUB-PARAGRAPHS ONE AND TWO
24 AND THREE.

25 A WE DON'T PUBLISH EACH YEAR WHEN THE PAY TABLES, THE

1 ANNUAL PAY RANGES FOR ALL OF THE CLINICAL -- FOR ALL OF THE
2 PHYSICIAN AND DENTIST PAY TABLES, AS THEY ARE INCREASED WE
3 DON'T PUBLISH THOSE ACTUAL PAY RANGES IN THE POLICY BECAUSE
4 IF WE DID, EVERY TIME THE PAY RANGES CHANGE, WE'D HAVE TO
5 REVISE POLICY, AND REVISING POLICY IS A -- IS A LONG PROCESS.

6 THE PARAGRAPH THAT YOU ARE REFERRING TO ON 831 IS THE
7 PARAGRAPH AS OF APRIL 2ND, 2013 THAT PROVIDES WHAT THE
8 MEDICAL CENTER DIRECTOR CAN APPROVE, WHAT THE NETWORK
9 DIRECTOR CAN APPROVE, AND WHAT THE UNDERSECRETARY FOR HEALTH
10 CAN APPROVE AS FAR AS ANNUAL PAY RANGES -- ANNUAL PAY RATES.

11 Q OKAY. NOW, LET ME DIRECT YOUR ATTENTION TO KENNEDY VA
12 826. THIS IS PARAGRAPH 13 ON COMPENSATION PANELS. AND YOU
13 AND I TALKED ABOUT THIS SECTION I THINK AT YOUR DEPOSITION
14 AND ABOUT THE PARENTHETICAL THAT IS INCLUDED IN THERE. DO
15 YOU RECALL THAT?

16 A NO.

17 Q OKAY.

18 A I MEAN, I JUST DON'T REMEMBER.

19 Q YEAH. ALL RIGHT. I UNDERSTAND. ALL RIGHT. DO YOU
20 KNOW -- DO YOU SEE IT IN FRONT OF YOU NOW?

21 A WHICH ONE ARE YOU...

22 Q THIS IS ON PAGE KENNEDY VA 826.

23 A AND WHICH PARENTHETICAL?

24 Q I'M LOOKING AT 13A1 AND THE PARENTHETICAL IS CONSIDERING
25 THE COMBINED SUM OF THE BASE PAY AND MARKET PAY.

1 A YES, I SEE THAT.

2 Q ALL RIGHT. AND I BELIEVE YOU TOLD ME THAT THAT CHANGE
3 CAME INTO EFFECT THROUGH A REVISION IN APRIL OF 2013. IS
4 THAT YOUR UNDERSTANDING?

5 A I DON'T REMEMBER.

6 Q OKAY. LET'S DO THIS. LET ME ASK THE CLERK TO UNSEAL
7 YOUR DEPOSITION AND THEN WE CAN TAKE A LOOK AT SOME OF YOUR
8 TESTIMONY AND SEE IF THAT REFRESHES YOUR RECOLLECTION --

9 A OKAY.

10 Q -- ON THAT POINT. ALL RIGHT. MRS. DOTY, YOU KNOW THE
11 DRILL FROM LISTENING TO THE OTHERS. YOU RECALL GIVING THIS
12 DEPOSITION ON MAY THE 11TH, 2016?

13 A YES.

14 Q ALL RIGHT. AND WHEN YOU GAVE YOUR TESTIMONY, YOU GAVE
15 THAT TESTIMONY UNDER OATH TO TELL THE TRUTH; IS THAT CORRECT?

16 A YES.

17 Q AND TO THE BEST OF YOUR ABILITY YOU HAVE TOLD THE TRUTH
18 ON THAT DAY?

19 A YES.

20 Q ALL RIGHT. AND SO LET ME ASK YOU TO TAKE A LOOK AT PAGE
21 43 OF YOUR TESTIMONY -- AND CERTAINLY DON'T INTEND TO LIMIT
22 YOU TO A FEW LINES. IF YOU NEED TO LOOK BACK OR FORWARD, YOU
23 CAN DO THAT. BUT YOU WILL SEE THAT WE ARE DISCUSSING PAGE
24 ROMAN NUMERAL 9-12 WHICH APPEARS IN THE HANDBOOK THAT WE HAVE
25 MARKED AS EXHIBIT 1 AS KENNEDY VA 826 AND WE WERE TALKING

1 ABOUT THE PARENTHETICAL CONSIDERING THE COMBINED SUM OF THE
2 BASE PAY AND MARKET PAY, CLOSED PARENTHESIS.

3 DO YOU SEE WHERE I AM NOW?

4 A YES.

5 Q OKAY. AND SO, MY QUESTION TO YOU AT LINE 12 WAS, OKAY,
6 AND WERE WE CORRECT THAT THE BRACKETS ARE WHERE I SAID THEY
7 WERE, THAT IS AROUND THE PARENTHETICAL, CONSIDERING THE
8 COMBINED SUM OF THE BASE PAY AND MARKET PAY, CLOSED
9 PARENTHESIS, AND THAT TELLS YOU THAT THIS CHANGE WAS
10 IMPLEMENTED AS OF APRIL THE 2ND OF 2013.

11 AND WHAT WAS YOUR ANSWER?

12 A YES, THAT IT WAS REVISED APRIL 2013.

13 Q OKAY. AND SO -- AND THEN MY NEXT QUESTION, SO PRIOR TO
14 THAT TIME THEN, THAT PARENTHETICAL WOULD NOT HAVE BEEN IN THE
15 HANDBOOK. AND YOUR ANSWER?

16 A YES, THAT'S CORRECT, IT WAS NOT IN THE HANDBOOK.

17 Q ALL RIGHT. OKAY. AND WHERE IN THE STATUTE DO YOU FIND
18 AUTHORITY FOR THAT -- THAT BEING THIS PARENTHETICAL -- THAT
19 IS, THAT IN RECOMMENDING THE MARKET PAY THAT THERE SHOULD BE
20 A CONSIDERATION OF THE COMBINED SUM OF BASE AND MARKET?

21 A WHAT WE CHANGED IN POLICY -- WELL, NOW TRYING TO FIND
22 OUT -- IS THAT WHEN THE COMPENSATION PANEL IS EVALUATING
23 THE -- NO, I'M SORRY. LOOKING AT THE WRONG REFERENCE. WERE
24 WE ON 13A? IS THAT THE REFERENCE THAT WE WERE DISCUSSING?

25 Q YES, THAT'S WHAT WE WERE--

1 A OKAY. WHAT WE WERE CLARIFYING IN POLICY WITH THAT
2 CHANGE WAS IN THE MIDDLE OF THAT PARAGRAPH IN 13A, THE
3 COMPENSATION PANEL IS ALSO RESPONSIBLE FOR EVALUATING THE
4 ANNUAL PAY PAREN BASE PAY AND MARKET PAY TO INCLUDE PAY TABLE
5 AND TIER ASSIGNMENT FOR EACH POSITION AND DENTIST UNDER ITS
6 JURISDICTION.

7 Q AND AGAIN, YOU'RE READING FROM THE HANDBOOK --

8 A YES, I AM.

9 Q -- AND NOT THE STATUTE.

10 A CORRECT. YES. WE ARE CLARIFYING IT IN VA POLICY THE
11 PROCESS FOR DOING THAT.

12 Q FAIR ENOUGH. I UNDERSTAND. AND MY QUESTION HAD BEEN,
13 WHERE DOES IT SAY IN THE STATUTE THAT THAT IS AUTHORIZED?
14 THAT WAS MY ONLY QUESTION.

15 A CORRECT.

16 Q AND SO YOU--

17 A IT IS NOT. YES.

18 Q OH, OKAY.

19 A THAT'S IN OUR POLICY THAT'S BASED ON THE STATUTE,
20 CORRECT.

21 Q ALL RIGHT. THANK YOU VERY MUCH. AND I BELIEVE THAT YOU
22 SAID -- YOU POINTED OUT THAT YOU THINK DR. KENNEDY'S
23 FUNDAMENTAL MISUNDERSTANDING IN THIS CASE IS THAT HE DOESN'T
24 UNDERSTAND THAT THE VA LOOKS AT ANNUAL PAY WHEN SETTING THE
25 PAY FOR PHYSICIANS AND THAT YOU DON'T LOOK AT MARKET PAY

1 DISCRETELY OR IN ISOLATION. IS THAT YOUR VIEW?

2 A THAT'S CORRECT.

3 Q ALL RIGHT. AND I BELIEVE YOU WOULD AGREE AND INDICATED
4 IN YOUR DEPOSITION THAT IT IS -- THAT TYPICALLY OR ROUTINELY
5 STAFF, SUCH AS DR. MILLER, WHO IS THE CHIEF OF THE
6 ANESTHESIOLOGY SERVICE --

7 A UH-HUH.

8 Q -- WOULD MAKE A RECOMMENDATION ON ANNUAL PAY AND THEN HR
9 COMPUTES THE BASE PAY USING THE LONGEVITY TABLE. YOU WITH ME
10 ON THAT?

11 A YES.

12 Q ALL RIGHT. AND THEN MARKET PAY BECOMES AN ARITHMETIC
13 FUNCTION OR CALCULATION OF ANNUAL PAY MINUS BASE PAY EQUALS
14 MARKET PAY.

15 A CORRECT.

16 Q WHERE IN THE STATUTE DOES IT AUTHORIZE THAT YOU CAN
17 ARRIVE AT MARKET PAY BY THIS ARITHMETIC FUNCTION OF
18 SUBTRACTING BASE PAY FROM ANNUAL PAY?

19 A IT DOESN'T, BUT WHEN WE RECEIVE STATUTE, STATUTE IS --
20 IS -- DOES NOT CERTAINLY PROVIDE A PROCESS. SO IN THIS CASE
21 AND IN MANY OTHER CASES WHEN WE HAVE A STATUTE THAT
22 IMPLEMENTS A NEW PAY SYSTEM, WE TAKE THE BONES OR THE
23 SKELETON OF, YOU KNOW, THAT STATUTE AND WE CREATE AN AGENCY
24 POLICY AND PROCESS.

25 Q OKAY. BUT YOU WOULD AGREE WITH ME, THOUGH, THAT IN THIS

1 CASE THE STATUTE SETS FORTH MORE THAN BONES WHEN IT LISTS THE
2 FACTORS THAT ARE TO BE DETERMINED BY THE COMPENSATION PANEL
3 --

4 A CORRECT.

5 Q -- IN OR -- OR TO BE TAKEN INTO ACCOUNT IN DETERMINING
6 MARKET PAY.

7 A CORRECT.

8 Q DO YOU HAVE RESPONSIBILITIES IN RELATION TO PENSION
9 BENEFITS?

10 A NO.

11 Q OKAY. ALL RIGHT. SAVED US SOME TIME. ALL RIGHT. DO
12 YOU KNOW OF ANY VA POLICY OR RULE OR DIRECTIVE AUTHORIZING
13 THE EQUALIZATION OF AWARDS OF ANNUAL PAY FOR VA PHYSICIANS
14 SUCH AS I THINK YOU'RE NOW FAMILIAR WITH IN THE NOVEMBER 2016
15 PANEL REVIEWS THAT WERE DONE FOR DR. KENNEDY AND THE OTHER
16 STAFF PHYSICIANS? DO YOU KNOW OF ANY RULE OR DIRECTIVE THAT
17 AUTHORIZES THAT BE DONE?

18 A WELL, OUR VHA PHYSICIAN AND DENTIST PAY POLICY IN PART
19 NINE ALLOWS -- THERE'S THREE TIMES THAT A COMPENSATION PANEL
20 MEETS. IT MEETS IN TO RECOMMEND AN INITIAL RATE OF PAY FOR A
21 NEW HIRE. IT MEETS -- THE POLICY STATES TO MEET THAT 24
22 MONTH BIENNIAL REVIEW THAT'S REQUIRED IN STATUTE. AND THEN
23 THE POLICY ALLOWS THAT A POLICY CAN BE -- I'M SORRY -- A
24 COMPENSATION PANEL CAN BE CONVENED AS DEEMED NECESSARY BY AN
25 APPROPRIATE MANAGEMENT OFFICIAL.

1 SO WE HAVE THOSE THREE ITEMS AVAILABLE ON THE FORM TO
2 CHECK WHETHER THIS COMPENSATION PANEL IS FOR AN INITIAL
3 APPOINTMENT, FOR A BIENNIAL REVIEW, OR FOR SOME OTHER REASON.
4 SO, I THINK WHAT YOU'RE REFERRING TO FITS INTO THAT
5 FOR-OTHER-REASONS CATEGORY.

6 Q DID THE -- TO YOUR KNOWLEDGE DID THE VA, WHEN IT
7 UNDERTOOK TO DESCRIBE THIS PARAGRAPH 13A AND HAS THE
8 PARENTHETICAL IN IT THAT DOESN'T CONFORM TO THE STATUTE ABOUT
9 CONSIDERING THE COMBINED SUM OF BASE PAY AND MARKET PAY, DO
10 YOU KNOW WHETHER THE VA TOOK INTO CONSIDERATION WHAT IMPACT
11 THAT PARENTHETICAL WOULD HAVE ON OLDER PHYSICIANS WHO WERE
12 ALREADY IN THE VA SYSTEM?

13 A WELL, I DON'T BELIEVE THAT IT DOESN'T CONFORM TO
14 STATUTE, BUT -- WE DON'T -- I DON'T KNOW HOW TO ANSWER YOUR
15 QUESTION. IT -- WE WERE TRYING TO CLARIFY THAT WHEN COMP
16 PANELS ARE MAKING RECOMMENDATIONS FOR ANNUAL PAY THAT ANNUAL
17 PAY IS A COMBINATION OF THE BASE PAY AND MARKET PAY.

18 Q I UNDERSTAND. AND WHAT MY QUESTION WAS -- IT WAS
19 INARTFULLY ASKED -- WAS DID YOU CONSIDER, DO YOU KNOW -- DID
20 THE VA CONSIDER THE IMPACT OF THAT PARENTHETICAL ON OLDER
21 PHYSICIANS?

22 A I'M NOT AWARE THAT WE DID THAT.

23 Q OKAY. I BELIEVE THAT THAT IS ALL THAT I HAVE. IF YOU'D
24 JUST GIVE ME A INDULGENCE OF JUST A MOMENT. THANK YOU,
25 MRS. DOTY. ANSWER ANY QUESTIONS, OF COURSE, THAT MRS. BAILEY

1 MAY HAVE FOR YOU.

2 CROSS-EXAMINATION

3 BY MRS. BAILEY:

4 Q NOW MRS. DOTY, YOU HAVE BEEN SITTING HERE THROUGHOUT
5 THIS TRIAL AS THE GOVERNMENT'S REPRESENTATIVE. I APPRECIATE
6 THAT. AND I WANT TO ASK YOU TO ANSWER A FEW QUESTIONS AND
7 THERE'S PROBABLY GOING TO BE SOME OVERLAP WITH WHAT MR. IRVIN
8 ASKED YOU.

9 A OKAY.

10 Q WILL JUST BEAR WITH ME. WE TALKED ABOUT THE VA HANDBOOK
11 AS EXHIBIT 1. AND WHAT IS THAT?

12 A THE VA HANDBOOK?

13 Q YES, MA'AM.

14 A IT'S THE AGENCY GUIDANCE AND PROCESS AND PROCEDURES THAT
15 WE USE. 5007 COVERS -- THAT HANDBOOK COVERS ALL OF THE PAY
16 ADMINISTRATION COVERING BOTH TITLE FIVE AND TITLE 38.

17 Q WHO ALL USES THAT HANDBOOK?

18 A THE ENTIRE VA. PRIMARILY HR OFFICES BUT IT'S VA -- IT
19 COVERS VA-WIDE.

20 Q SO IS THAT JUST THE HOSPITALS, THE VA HOSPITALS?

21 A NO, THE NETWORK OFFICES USE THEM, VBA USES...

22 Q AND WHAT IS VBA?

23 A I'M SORRY. THE VETERAN'S BENEFITS ADMINISTRATION. THE
24 NATIONAL CEMETERY ADMINISTRATION USES PARTS OF IT. NOT ALL
25 THE PARTS APPLY BECAUSE THEY DON'T -- THEY ARE NOT COVERED

1 UNDER TITLE 38. SO IT'S A COMPREHENSIVE PAY ADMINISTRATION
2 HANDBOOK FOR -- THAT OUTLINES ALL THE POLICIES AND PROCEDURES
3 AND PROCESSES AND FLEXIBILITIES THAT VA MAINTAINS.

4 Q AND WHY DO YOU HAVE ONE HANDBOOK FOR ALL OF THOSE
5 DIFFERENT USES?

6 A WE LUMP OUR HANDBOOKS INTO HR AREAS OF RESPONSIBILITY OR
7 DISCIPLINE. SO WE HAVE ONE THAT COVERS RECRUITMENT AND
8 PLACEMENT, WE HAVE ONE THAT COVERS WORK LIFE BENEFITS, AND WE
9 HAVE ONE THAT COVERS HOURS OF DUTY, AND ONE THAT COVERS
10 RETIREMENTS AND TERMINATIONS AND CONDUCT ISSUES. AND THIS
11 ONE, 5007, COVERS PAY ADMINISTRATION.

12 Q IS THERE SOME BENEFIT TO HAVE -- HAVE UNIFORMITY IN THE
13 PAY ADMINISTRATION?

14 A OH ABSOLUTELY.

15 Q AND WHAT IS THAT? WHAT'S THE BENEFIT?

16 A THE -- WELL, AS A FEDERAL AGENCY, WHAT WE WANT TO ENSURE
17 CONFORMITY TO STATUTE, WE WANT TO ENSURE CONFORMITY
18 AMONGST -- WE HAVE AT LEAST 152 DIFFERENT OPERATING HR
19 OFFICES. WE WANT TO MAKE SURE THAT THEY ARE ALL IN
20 COMPLIANCE WITH STATUTE AND, YOU KNOW, AND THEN POLICY.

21 Q HAVE YOU HAD A CHANCE TO LOOK AT EXHIBIT NUMBER 4, THE
22 VA POLICIES, THE LOCAL VA POLICIES? YOU CAN PULL THAT UP.
23 PLAINTIFF'S EXHIBIT 4.

24 THE COURT: PLAINTIFF'S OR DEFENSE?

25 MRS. BAILEY: PLAINTIFF'S.

1 THE WITNESS: YES, I HAD A CHANCE TO LOOK AT THAT.

2 BY MRS. BAILEY:

3 Q YOU WERE HERE WHEN MRS. TAMARA NICHOLS TESTIFIED ABOUT
4 THIS FORM, HEARD HER CROSS-EXAMINATION ON IT ALSO.

5 A YES.

6 Q IS THIS POLICY, IS THIS MEMORANDUM FOR THE MEDICAL
7 CENTER HERE IN COLUMBIA, IS THAT CONSISTENT WITH WHAT'S DONE
8 NATIONALLY?

9 A IT'S -- YES, IT'S A -- IT'S AN EXCERPT. OFTEN TIMES
10 INSTEAD OF HANDING, YOU KNOW, A POLICY THAT'S LARGER THAN
11 THIS TO SOMEONE, MANY VA OFFICES WILL DO STANDARD OPERATING
12 PROCEDURES OR MEMORANDUMS AND THEY WILL TAKE OUT AND PROVIDE
13 GUIDANCE THAT'S IDENTICAL TO POLICY AND PROVIDE THAT GUIDANCE
14 TO INDIVIDUALS. IN THIS CASE THIS IS TO DO WITH THE
15 COMPENSATION PANELS FOR PHYSICIANS AND DENTISTS.

16 Q DOES THIS CONFORM WITH NATIONAL VA POLICY?

17 A YES.

18 Q WHEN I SAY THIS, I MEAN DOES PLAINTIFF'S EXHIBIT 4
19 CONFORM WITH NATIONAL VA POLICY?

20 A YES.

21 Q I'D LIKE FOR YOU NEXT TO LOOK AT THE -- GO TO EXHIBIT 1,
22 PLAINTIFF'S EXHIBIT NUMBER 1 AND TO PAGE VA UNDERSCORE 814.
23 AND I KNOW THAT YOU HAVE HAD SOME QUESTIONS ABOUT THIS PAY,
24 ABOUT THIS PAGE, BUT DOES THIS PAGE DEFINE WHAT A
25 COMPENSATION PANEL IS?

1 A YES. IT SAYS IT'S A GROUP OF PHYSICIANS OR DENTISTS
2 RESPONSIBLE FOR THE EVALUATION OF PHYSICIANS OR DENTISTS AND
3 FOR MAKING RECOMMENDATIONS TO THE APPROVING OFFICIAL FOR
4 ANNUAL PAY.

5 Q NOW, FROM THE TESTIMONY YOU HAVE HEARD IN THIS CASE, IS
6 THAT WHAT THE COMPENSATION PANELS AT DORN HAVE DONE?

7 A YES.

8 Q AND THEN GO ON TO THE SAME EXHIBIT BUT TO VA PAGE 826.
9 AND IN THIS PARAGRAPH AT THE BOTTOM WHERE IT TALKS ABOUT THE
10 FUNCTION IN THE COMPENSATION PANELS --

11 A YES.

12 Q -- THINK ABOUT HALF-WAY DOWN IT TALKS ABOUT THE FUNCTION
13 OF COMPENSATION PANEL IS RESPONSIBLE FOR EVALUATING ANNUAL
14 PAY.

15 A YES.

16 Q DO YOU SEE THAT?

17 A I DO.

18 Q CAN YOU READ THAT SENTENCE TO US?

19 A THE COMPENSATION PANEL IS ALSO RESPONSIBLE FOR
20 EVALUATING THE ANNUAL PAY, BASE PAY, AND MARKET PAY TO
21 INCLUDE PAY TABLE AND TIER ASSIGNMENT OF EACH PHYSICIAN AND
22 DENTIST UNDER ITS JURISDICTION AT LEAST ONCE EVERY 24 MONTHS,
23 BIENNIAL REVIEW, AND AT SUCH OTHER TIMES DEEMED NECESSARY BY
24 THE APPROPRIATE MANAGEMENT OFFICIAL.

25 Q AND YOU LOOK AT WHERE IT SAYS, FOR EVALUATING THE ANNUAL

1 PAY?

2 A YES.

3 Q AND IN PARENTHESIS YOU'VE GOT BASE PAY AND MARKET PAY?

4 A YES.

5 Q WHY ARE THOSE NUMBERS IN PARENTHESIS?

6 A AS INFORMATION TO -- OR A SPECIFIC GUIDANCE THAT IN VA
7 FOR VHA PHYSICIANS AND DENTISTS, THEIR ANNUAL PAY IS COMPOSED
8 OF TWO COMPONENTS; BASE PAY AND MARKET PAY.

9 Q AND SO THE COMPENSATION PANEL COMES UP WITH ANNUAL PAY
10 --

11 A CORRECT.

12 Q -- WITH THOSE TWO COMPONENTS?

13 A CORRECT.

14 Q DOES IT SAY HERE THAT THE COMPENSATION PANEL HAS TO COME
15 UP WITH A DIFFERENT EVALUATION OF THE MARKET PAY AND THE BASE
16 PAY?

17 A NO, IT DOES NOT.

18 Q IT ALSO TALKS IN THIS PARAGRAPH ABOUT THE BIENNIAL
19 REVIEWS.

20 A YES.

21 Q NOW, WHAT ARE THOSE?

22 A THAT'S THE REVIEWS THAT ARE REQUIRED FOR EVERY VHA
23 PHYSICIAN AND DENTIST THAT'S REQUIRED IN STATUTE TO BE
24 CONDUCTED EVERY 24 MONTHS.

25 Q AND WHY ARE THEY CONDUCTED EVERY TWO YEARS OR 24 MONTHS?

1 A I WASN'T INSTRUMENTAL IN WRITING THIS LAW OR THIS
2 LEGISLATIVE PROPOSAL, BUT I THINK IT'S TO ENSURE THAT ANNUAL
3 PAY IS REVIEWED ON A REGULAR, A FAIRLY REGULAR BASIS FOR
4 PHYSICIANS AND DENTISTS.

5 Q WE HAVE HEARD SOME TESTIMONY ABOUT THE HAY SURVEY.

6 A YES.

7 Q WHAT ARE THESE SURVEYS? WHAT ARE THE VARIOUS SURVEYS
8 AND WHAT'S THE HAY SURVEY?

9 A WELL, HAY IS JUST A TERM THAT FOR SOME REASON IS USED
10 COMMONLY TO REFER TO THE SALARY SURVEY DATA PRODUCTS. VHA
11 HAS A -- ACTUALLY A MULTI-MILLION-DOLLAR CONTRACT. WE
12 PURCHASE ABOUT 65 DIFFERENT REGIONAL AND NATIONAL HEALTHCARE
13 SURVEY DATA PRODUCTS EVERY YEAR.

14 AND THOSE SURVEY DATA PRODUCTS ARE USED NOT ONLY TO HELP
15 DEFINE OR PROVIDE INFORMATION ON PHYSICIAN AND DENTIST PAY AT
16 EACH LOCAL LABOR MARKET, IT'S ALSO USED FOR OUR NURSES TO SET
17 THEIR SCHEDULES FOR -- TO SET PAY FOR HEALTHCARE, OTHER VA
18 HEALTHCARE OCCUPATIONS FOR JUSTIFYING DIFFERENT INCENTIVES
19 THAT WE MAY WANT TO JUSTIFY -- AUTHORIZE TO HEALTHCARE
20 EMPLOYEES -- EMPLOYEES IN HEALTHCARE OCCUPATIONS.

21 SO IT'S -- THESE ARE USED VERY EXTENSIVELY THROUGHOUT
22 THE VA. HAY GROUP IS JUST ONE OF THE MANY NATIONAL SURVEY
23 DATA PRODUCTS THAT WE PURCHASE AND PROVIDE TO THE FIELDS SO
24 THAT THEY DON'T HAVE TO TRY TO GO OUT AND FIND THIS
25 THIRD-PARTY SURVEY DATA ON THEIR OWN. AND THAT IS A VERY

1 COMMON COMPENSATION PRACTICE BOTH IN THE FEDERAL GOVERNMENT
2 AND THE PRIVATE SECTOR. WE ARE ALL USING THIS SAME
3 THIRD-PARTY SURVEY DATA PRODUCTS.

4 Q NOW, THE INFORMATION YOU GET ON THIS THIRD-PARTY SURVEY
5 PRODUCT -- WE'RE JUST GOING TO CALL IT THE HAY DATA.

6 A OKAY.

7 Q HOW DOES THAT HELP YOU WITH PHYSICIAN PAY?

8 A THE VARIOUS PRODUCTS INCLUDING THE HAY GROUP SURVEY DATA
9 WILL PROVIDE ANNUAL RATES OF AVERAGE ANNUAL RATES OF PAY FOR
10 PHYSICIANS IN VARIOUS LABOR MARKETS, SO WE ARE ABLE TO USE
11 THAT TO SEE HOW COMPARABLE VA IS WITH PHYSICIANS IN THE
12 PRIVATE SECTOR.

13 Q NOW, THIS SURVEY DATA, DOES IT TALK ABOUT THE COST OF
14 LIKE MEDICAL MALPRACTICE INSURANCE OR VACATION DAYS OR OTHER
15 BENEFITS THAT PHYSICIANS IN PRIVATE PRACTICE MIGHT HAVE?

16 A TYPICALLY NOT. THERE'S A FEW THAT MAY GIVE A LITTLE BIT
17 OF INFORMATION ON AN -- IF A -- IF PHYSICIANS RECEIVE AN
18 ON-CALL BENEFIT, BUT TYPICALLY THEY DON'T GO INTO THAT
19 DETAIL.

20 Q SO IS THE HAY INFORMATION YOU GET THE TOTAL SALARY FOR
21 THE PHYSICIANS?

22 A ANNUAL, YES. IT LISTS -- I THINK IT REFERS TO IT AS
23 ANNUAL SALARY OR ANNUAL PAY.

24 Q ANNUAL SALARY.

25 A YES.

1 Q SO THE COMPENSATION BOARDS AT THE VA HOSPITALS ARE
2 LOOKING AT ANNUAL SALARY?

3 A YES.

4 Q AND THE HAY INFORMATION IS ALSO ANNUAL SALARY?

5 A CORRECT. WE WOULD CERTAINLY WANT TO MAKE SURE WE'RE
6 USING COMPARABLE DATA THAT'S PROVIDING, YOU KNOW, THE
7 COMPARABLE DATA POINTS.

8 Q AND WHY IS IT IMPORTANT TO HAVE COMPARABLE DATA POINTS?

9 A BECAUSE WE NEED TO MAKE SURE THAT WHEN WE ARE LOOKING
10 AT -- WHEN WE ARE MAKING RECOMMENDATIONS -- WHEN THE
11 COMPENSATION PANEL IS MAKING RECOMMENDATIONS ON ANNUAL
12 SALARY, THAT THE SURVEY DATA THAT THEY ARE USING IS ALSO
13 REFLECTIVE OF THE ANNUAL SALARY THAT'S PAID FOR THAT
14 PARTICULAR CLINICAL SPECIALTY IN A PARTICULAR LOCAL LABOR
15 MARKET.

16 Q I KNOW MR. IRVIN WAS ASKING YOU ABOUT THE FORMS THAT
17 WERE USED BY THE COMPENSATION REVIEW BOARDS. THAT WAS VA
18 FORM 100432A?

19 A YES.

20 Q IS THAT DONE ALL ACROSS THE COUNTRY?

21 A IT IS.

22 Q AND IT'S A VERY SAME FORM NUMBER?

23 A YES.

24 Q SO HOW DO -- HOW DOES THE MARKET SURVEY PAY COME UP ON
25 THESE -- ON THE -- BEFORE THE PANEL? HOW DOES THE PANEL KNOW

1 ABOUT THAT?

2 A THE -- I'M SORRY. THE...

3 Q LIKE THE HAY SURVEY. IF YOU'RE SETTING -- HOW DOES THE
4 COMPENSATION PANEL OR THE VA, LOCAL VA HOSPITAL, KNOW ABOUT
5 WHAT THE SURVEY RATES FOR PAYMENTS ARE?

6 A WELL, HR HAS ACCESS TO ALL OF THE NATIONAL SURVEY DATA
7 PRODUCTS.

8 Q AND THAT WOULD BE THE HUMAN RESOURCES OFFICE --

9 A YES.

10 Q -- AND HOSPITAL OR FACILITY?

11 A CORRECT. AND HUMAN RESOURCES IS RESPONSIBLE FOR
12 PROVIDING THAT SURVEY DATA AND, FOR EXAMPLE, IN THIS CASE TO
13 THE CHIEF OF ANESTHESIOLOGY AS TO BE USED, YOU KNOW, IN
14 DETERMINING COMPARABLE RATES OF PAY.

15 Q THERE'S ONE MORE FORM I'D LIKE FOR YOU TO LOOK AT. IT'S
16 DEFENDANT'S EXHIBIT NUMBER 4. DO YOU RECOGNIZE THAT?

17 A YES, I DO. IT'S THE FEDERAL REGISTER NOTICE FOR A
18 CHANGE. THE FEDERAL REGISTER NOTICES ARE REQUIRED ANY TIME
19 THE SECRETARY OF VA MAKES CHANGES TO THE ANNUAL PAY RANGES,
20 TIERS, OR PAY TABLES FOR VHA PHYSICIANS AND DENTISTS.

21 WE ARE REQUIRED BY STATUTE ONCE THOSE CHANGES, WHATEVER
22 CHANGES ARE APPROVED, WE ARE REQUIRED TO PROVIDE NOTICE TO
23 THE GENERAL PUBLIC IN THE FORM OF A FEDERAL REGISTER NOTICE.
24 IT'S PUBLISHED FOR 60 DAYS. AND THE EFFECTIVE CHANGES ARE
25 THEN MADE -- MADE EFFECTIVE THE FIRST DAY OF THE FIRST PAY

1 PERIOD FOLLOWING THAT 60-DAY NOTIFICATION PERIOD.

2 Q AND WHO IS RESPONSIBLE FOR THIS DOCUMENT?

3 A I DID THIS DOCUMENT.

4 Q SO YOU WROTE IT?

5 A YES.

6 Q AND YOU -- IT WAS PUBLISHED IN THE FEDERAL REGISTER?

7 A YES.

8 Q OKAY. I'D LIKE FOR YOU TO LOOK DOWN TO THE SECOND

9 PARAGRAPH UNDER SUMMARY.

10 A YES.

11 Q IT STARTS WITH, THESE ANNUAL PAY RANGES.

12 A YES.

13 Q WOULD YOU READ THAT.

14 A THESE ANNUAL PAY RANGES ARE INTENDED TO ENHANCE VA
15 FLEXIBILITY TO RECRUIT, DEVELOP, AND RETAIN THE MOST
16 HIGHLY-QUALIFIED PROVIDERS TO SERVE OUR NATION'S VETERANS AND
17 MAINTAIN A STANDARD FOR EXCELLENCE IN THE VA HEALTHCARE
18 SYSTEM.

19 Q NOW, WHAT PART OF THE PHYSICIAN'S PAY DOES THIS ANNUAL
20 PAY RANGE DEAL WITH?

21 A I'M SORRY. I DON'T QUITE UNDERSTAND.

22 Q WELL, HOW DOES THIS RELATE TO THE --

23 A OH.

24 Q -- THE -- OUR FORMULA HERE OF THE BASE PAY PLUS MARKET
25 PAY EQUALS ANNUAL PAY?

1 A WELL, IN VA ANNUAL PAY IS MADE UP OF BASE PAY AND MARKET
2 PAY.

3 Q AND SO THESE PAY RANGES ARE -- THAT THESE--

4 A FINAL RANGE -- YES. I'M SORRY. THE PAY RANGES ARE
5 PUBLISHED, AND IT'S A PAY TABLE BASICALLY, AND IT HAS ALL THE
6 DIFFERENT CLINICAL SPECIALTIES. IT HAS THE AMOUNTS, THE
7 MINIMUM AND MAXIMUM AMOUNTS THAT THE SECRETARY APPROVED, AND
8 IT IS -- IT'S A PUBLICATION THAT IS THEIR APPROVED PAY RANGES
9 FOR EACH CLINICAL SPECIALTY FOR EACH PAY TABLE FOR EACH TIER.

10 Q AND THEN IF YOU COULD GO TO PAGE 3 OF THIS THERE'S A
11 SECTION THAT SAYS, PAY TABLE FOUR, CLINICAL SPECIALTY.

12 A YES.

13 Q CAN YOU EXPLAIN THIS TO US?

14 A THE SECRETARY -- THE VHA PHYSICIAN AND DENTIST STEERING
15 COMMITTEE MAKES RECOMMENDATIONS BASED ON A VARIETY OF THINGS,
16 BUT BASED ON THIRD-PARTY SURVEY DATA, THE SALARY SURVEY DATA
17 PRODUCTS, THEY LOOK AT OUR STAFFING RETENTION TURNOVER RATES,
18 BUT PRIMARILY THEY LOOK AT SALARY, COMPARABLE SALARIES IN THE
19 PRIVATE SECTOR, AND WE LUMP TOGETHER VARIOUS PHYSICIAN AND
20 DENTIST CLINICAL SPECIALTIES INTO PAY TABLES. AND THE PAY
21 TABLES DEFINE THE MINIMAL AND MAXIMUM RATES OF ANNUAL PAY
22 THAT CAN BE AUTHORIZED TO THESE VARIOUS CLINICAL SPECIALTIES.

23 Q AND SO WHAT IS IT FOR ANESTHESIOLOGY?

24 A AS OF THIS DATE FOR PAY TABLE FOUR, FOR TIER ONE, WHICH
25 IS FOR STAFF PHYSICIANS, THE MAXIMUM WAS 325. SO THESE

1 MINIMUM AND MAXIMUM RATES ARE INTENDED IN THE VA TO REFLECT
2 FOR ALL OF OUR VARIOUS LABOR MARKETS A BROAD RANGE THAT
3 TYPICALLY OUR PHYSICIANS SHOULD BE ABLE TO FIT INTO.

4 Q AND SO THE PHYSICIAN -- A PHYSICIAN LIKE DR. KENNEDY,
5 WHAT TIER WOULD HE BE IN?

6 A IF DR. KENNEDY IS STAFFED, HE WOULD BE IN TIER ONE
7 MEANING NONSUPERVISORY.

8 Q AND SO THE VERY MAXIMUM HE'D GET IN 2014 WHEN THIS WAS
9 PUBLISHED NO MATTER WHERE HE WAS LOCATED WOULD BE THIS FIGURE
10 OF \$325,000?

11 A THAT'S CORRECT. THAT'S THE MAXIMUM RATE OF PAY TABLE.

12 Q NOW, MR. IRVIN WAS ASKING YOU EARLIER ABOUT EXCEPTIONS.

13 A CORRECT.

14 Q WHAT IS AN EXCEPTION?

15 A A PAY EXCEPTION IS AS WE SEE IN MOST PAY SYSTEMS IN THE
16 FEDERAL GOVERNMENT, THERE IS A WAY THAT IN -- I DON'T WANT TO
17 SAY EXTREME -- BUT IN UNIQUE CIRCUMSTANCES IN VARIOUS LOCAL
18 LABOR MARKETS WHERE THIS PAY TABLE MAY NOT BE SUFFICIENT TO
19 RECRUIT OR RETAIN A PHYSICIAN, THAT COMPENSATION PANEL CAN
20 RECOMMEND A HIGHER RATE, MAXIMUM RATE THAT GOES BEYOND THE
21 MAXIMUM OF THAT PAY TABLE.

22 AND DEPENDING ON THE AMOUNT THEY ARE RECOMMENDING, IT
23 EITHER GOES TO THE MEDICAL CENTER DIRECTOR, THE NETWORK OR
24 VISION DIRECTOR, OR TO THE UNDERSECRETARY FOR HEALTH.

25 Q AND SO THAT WOULD BE -- IN COLUMBIA IT MAY NOT BE

1 325,000; IS THAT CORRECT?

2 A I'M SORRY?

3 Q THE MAXIMUM FOR THE PAY TABLE IN A PARTICULAR LOCATION
4 MAY NOT BE 325,000 FOR A ANESTHESIOLOGIST.

5 A YOU MEAN THE PRIVATE SECTOR COMPARABLE RATES MAY NOT BE?

6 Q YES.

7 A IS THAT WHAT YOU'RE SAYING?

8 Q YES.

9 A CORRECT; THAT THOSE RATES WOULD VARY FROM LABOR MARKET
10 TO LABOR MARKET.

11 Q AND SO THIS MAXIMUM, THAT WOULD BE THE MAXIMUM ANNUAL
12 PAY?

13 A YES.

14 Q AND THAT WOULD BE BASED ON -- FOR EACH COMMUNITY BASED
15 ON OTHER FACTORS, WHAT -- HOW IT WOULD RELATE TO DIFFERENT --
16 LET ME START THIS ALL OVER AGAIN. WAS THE -- WOULD THE
17 MAXIMUM RATE OF 325,000 APPLY TO EVERY FACILITY ACROSS THE
18 COUNTRY?

19 A EVERY VA FACILITY ACROSS THE COUNTRY. AGAIN, THIS IS A
20 WIDE RANGE. IT GOES FROM 98,967, WHICH IS VERY LOW, TO
21 325,000. SO WHEN THE STEERING COMMITTEE IS LOOKING AT
22 RECOMMENDING TO THE SECRETARY -- AND IN THIS CASE THE
23 SECRETARY APPROVED THESE MAXIMUM -- MINIMUM AND MAXIMUM PAY
24 RANGES -- THIS WIDE RANGE IS INTENDED TO BE SUITABLE AND
25 ADEQUATE TO RECRUIT AND RETAIN PHYSICIANS IN ALL OF OUR LABOR

1 MARKETS ACROSS THE COUNTRY.

2 Q SO WHAT WOULD BE A JUSTIFICATION FOR GOING BEYOND THIS
3 RANGE?

4 A WELL, FOR EXAMPLE, WE HAVE SOME VERY HIGH-COST AREAS.
5 WEST LA IS ONE OF THEM. IT'S NOT JUST THAT THE COST THAT
6 IS -- IT'S NOT JUST BASED ON THEIR COST OF LIVING, WHICH IS
7 MUCH HIGHER THAN OTHER PLACES IN THE COUNTRY, BUT ALSO THEY
8 HAVE HAD DIFFICULTY, FOR EXAMPLE, RECRUITING CERTAIN TYPES OF
9 PHYSICIANS, YOU KNOW, FOR SEVERAL YEARS, SO THEY MAY COME IN
10 WITH A REQUEST TO EXCEED IN THIS CASE PAY TABLE FOUR, TIER
11 ONE, THAT MAXIMUM OF 325.

12 Q HOW ABOUT IF THEY WANTED TO EXCEED THE MAXIMUM FOR --
13 JUST ON AN ANNUAL PAY REVIEW BASIS WITHOUT ANY SPECIAL
14 FACTORS?

15 A THEY HAVE TO PROVIDE FAIRLY EXTENSIVE JUSTIFICATION AND
16 DOCUMENTATION AS TO WHY THEY ARE REQUESTING TO EXCEED OR
17 SEEKING A PAY EXCEPTION, SO THEY NEED TO PROVIDE INFORMATION
18 ON PAST RECRUITMENT DIFFICULTY, MAYBE RETENTION ISSUES. YOU
19 KNOW, IF A FACILITY CANNOT RECRUIT AND -- RECRUIT OR RETAIN
20 SURGEONS AND THEY ARE GOING TO HAVE TO CLOSE OR'S, THAT TYPE
21 OF THING, SO IT -- YOU KNOW, IT NEEDS TO BE BASED ON A
22 SIGNIFICANT REASON WHY WE ARE ASKING OR A PARTICULAR FACILITY
23 IS ASKING TO EXCEED THE MAXIMUM OF THE PAY TABLE.

24 Q DO YOU HAVE ANY IDEA HOW MANY EXCEPTIONS ARE GRANTED A
25 YEAR?

1 A I -- WE DON'T KEEP TRACK OF WHAT IS APPROVED BY THE
2 MEDICAL CENTER DIRECTOR OR THE NETWORK DIRECTOR AT THIS TIME,
3 BUT WE HAD LESS THAN 200 THAT CAME UP TO THE UNDERSECRETARY
4 FOR HEALTH THE LAST TIME I SAW A REPORT, AND THAT WAS EITHER
5 IN FOR 2017 OR 2016.

6 Q SO THAT'S 200 THAT WERE APPROVED IN 2016?

7 A NO, THAT WAS 200 THAT WERE SUBMITTED. I DON'T KNOW THE
8 AMOUNT THAT WERE APPROVED. THE UNDERSECRETARY APPROVED SOME
9 OF THEM AND THE -- THEY ARE NOT RUBBER-STAMPED. IT'S
10 SOMETHING THAT IS CAREFULLY CONSIDERED BY THE UNDERSECRETARY.

11 Q NOW, YOU WERE IN THE COURTROOM WHEN PROBABLY EIGHT OR SO
12 DOCTORS IN THE CURRENT VA TALKED ABOUT HOW THEY DID THE PAY
13 PANELS THAT WERE AT ISSUE IN THIS CASE.

14 A YES.

15 Q WHILE YOU WERE LISTENING, DID YOU SEE ANYTHING THAT
16 DEVIATED FROM NATIONAL VA POLICY OR THE PROCESS FOR DOING
17 THESE?

18 A NO.

19 Q I WANTED TO ASK YOU SPECIFICALLY ABOUT EXHIBIT 11,
20 PLAINTIFF'S EXHIBIT NUMBER 11. THESE ARE THE COMPENSATION
21 PANEL ACTIONS FOR 2015. AND IF YOU LOOK UNDER PART A OF THE
22 VERY FIRST PAGE, 1246, IT SAYS, REASON FOR COMPENSATION PANEL
23 REVIEW. AND IT SAYS OTHER.

24 A YES.

25 Q NOW, IS THAT UNUSUAL FOR THE OTHER TO BE CHECKED?

1 A NO. IT'S A PROVISION IN POLICY, AGAIN, THAT SAYS
2 COMPENSATION PANELS WILL MEET EITHER BASED TO -- EITHER TO
3 DETERMINE INITIAL RATE OF PAY FOR NEW EMPLOYEES BASED ON --
4 OR TO DO A BIENNIAL REVIEW ON AN EXISTING EMPLOYEE OR THE
5 POLICY ALLOWS FOR A PAY PANEL TO BE CONVENED BASED ON AN
6 APPROPRIATE MANAGEMENT OFFICIAL'S RECOMMENDATION.

7 Q WAS THERE ANY CHANGE MADE IN MR. ALGHOTHANI'S PAY AS A
8 RESULT OF THIS REVIEW?

9 A NO.

10 Q WE HAVE HAD TESTIMONY IN THIS CASE THAT DR. KENNEDY HAD
11 COMPLAINED ABOUT HIS PAY IN JANUARY OR FEBRUARY 2015 AND THAT
12 THE HR OFFICE RECONVENED THE PAY TABLES FOR EVERYONE. DO YOU
13 SEE ANYTHING IRREGULAR IN THAT?

14 A NO. I THINK THAT'S APPROPRIATE.

15 Q AND WHY WOULD IT BE APPROPRIATE?

16 A IF THE SERVICE CHIEF, SERVICE LINE CHIEF, DECIDED THAT
17 HE WANTED TO CONVENE A PAY PANEL FOR ONE ANESTHESIOLOGIST
18 BECAUSE THERE WAS SOME QUESTION AS TO PERHAPS THAT
19 INDIVIDUAL'S RATE OF PAY, I DON'T THINK IT'S UNUSUAL THAT
20 THAT WOULD BE ALSO EXTENDED TO LOOK AT OR REVIEW OTHER
21 SIMILARLY-SITUATED OR EXPERIENCED PHYSICIANS IN THAT SAME
22 CLINICAL DISCIPLINE OR CLINICAL SPECIALTY.

23 Q AND THEN IF YOU'D LOOK TO PLAINTIFF'S EXHIBIT NUMBER 8.
24 AND AGAIN, THAT'S FOR THAT SAME MAY 1ST, 2015. DO YOU SEE
25 ANYTHING IRREGULAR IN HIM BEING -- HIS REVIEW -- HIS PAY

1 BEING REVIEWED ALONG WITH THE OTHER ANESTHESIOLOGISTS
2 TOGETHER?

3 A NO.

4 Q NOW I'D LIKE FOR YOU TO GO TO THE SECOND PAGE OF THIS
5 EXHIBIT WHERE IT SAYS, COMPENSATION PANEL RECOMMENDATION.

6 A OKAY.

7 Q AT THE TOP TO THE RIGHT IT SAYS PAY RANGE OR RATE AND
8 THOSE NUMBERS UNDERNEATH IT. ARE THOSE THE SAME NUMBERS THAT
9 WE HAVE SEEN IN EXHIBIT 4 --

10 A I HAVE TO SEE...

11 Q -- THAT WE WERE JUST TALKING ABOUT?

12 A SHOULD BE THE PAY RANGES FROM THE PAY TABLES.

13 Q BASICALLY THE SAME AS ON PAGE THREE OF FOUR OF
14 EXHIBIT 4, DEFENDANT'S EXHIBIT 4. ANY WAY, THAT'S THE PAY
15 RANGES OFF THE TABLE?

16 A YES. YES.

17 Q NOW IT SHOWS THAT DR. KENNEDY'S BASE PAY WAS 126,613.

18 A YES.

19 Q AND THEN HIS MARKET PAY WAS 167. BUT WE HAVE HAD SOME
20 TESTIMONY THAT THE MARKET PAY THIS TIME PERIOD WAS -- RANGED
21 UP FROM MAYBE AS HIGH AS 305 OR THREE -- 319. IF YOU PUT IN
22 THE MARKET PAY HERE AS 300, WHICH WOULD BE ABOUT IN THE
23 MIDDLE OF THE PAY RANGE, 300,000, WHAT WOULD THAT MAKE HIS
24 TOTAL PAY, HIS ANNUAL PAY?

25 A LIKE \$426,000 IF I UNDERSTAND WHAT -- YOU'RE SAYING IF

1 WE ADD THE 300,000 IN MARKET PAY ONLY?

2 Q YES.

3 A AND THEN ADD THE BASE AND LONGEVITY TO THAT?

4 Q YES.

5 A IT WOULD SET ANNUAL SALARY AT LIKE 400 -- IN EXCESS OF
6 \$426,000.

7 Q SO DOING THE BASE PAY PLUS THE MARKET PAY WOULD LEAVE A
8 ANNUAL PAY OF ROUGHLY \$426,000 FOR DR. KENNEDY?

9 A YES. IN THIS SCENARIO, YES.

10 Q WELL, WHAT KIND OF AFFECT WOULD THAT HAVE ON -- IF YOU
11 DID -- YOU DID THAT FOR DR. KENNEDY -- IF THAT WAS THE WAY
12 YOU COMPUTED IT, HOW WOULD THAT AFFECT THE VA?

13 A IF THAT'S THE WAY WE COMPUTED PAY, IT WOULD -- IT WOULD
14 CAUSE FIRST OF ALL A TREMENDOUS BUDGETARY DEFICIT IN VA. YOU
15 KNOW, VA IS A FEDERAL AGENCY THAT HAS A FINITE BUDGET, SO
16 I -- WE HAVE 25,000 PLUS EMPLOYEES, SO THAT SIGNIFICANT OF AN
17 INCREASE THAT WOULD -- SOMEHOW THAT HAD TO BE APPLIED, THAT
18 PROCESS APPLIED ACROSS THE COUNTRY WOULD, YOU KNOW, HAVE A
19 TREMENDOUS NEGATIVE AFFECT ON VA'S BUDGET.

20 IT WOULD TAKE MONEY BASICALLY AWAY FROM MONEY THAT WE
21 USE TO TREAT PATIENTS AND PROVIDE HEALTHCARE. AND NOT TO
22 MENTION, IT WOULD CAUSE OUR PHYSICIANS TO IN THIS CASE BE
23 PAID A CONSIDERABLE AMOUNT OF MONEY GREATER THAN THE
24 COMPARABLE RATES OF PAY IN THE LABOR MARKET.

25 Q SO THE VA PHYSICIANS AT DORN WOULD BE PAID A LOT MORE

1 THAN THE ONES IN THE COMMUNITY?

2 A YES, BASED ON THE CALCULATION THAT THAT -- YES, BASED ON
3 WHAT WE JUST TALKED ABOUT, THEY WOULD.

4 Q WELL, HOW DOES THAT COMPORT WITH THE VA PHILOSOPHY?

5 A IT'S COMPLETELY CONTRARY TO THE VA PHILOSOPHY. IN ALL
6 OF OUR PAY SYSTEMS, WHILE WE WANT TO HAVE COMPETITIVE RATES,
7 WE DON'T ASPIRE TO AND IN MANY PAY SYSTEMS WE'RE REQUIRED BY
8 STATUTE NOT TO BE A PAY LEADER IN THE COMMUNITY.

9 SO WHILE WE WANT TO CREATE AS COMPETITIVE RATES AS WE
10 CAN BECAUSE OBVIOUSLY OUR GOAL IS TO BE ABLE TO ATTRACT AND
11 RETAIN THE HIGHEST-QUALITY PHYSICIANS AND DENTISTS AND
12 HEALTHCARE EMPLOYEES AS A WHOLE, YOU KNOW, WE ALSO HAVE TO BE
13 MINDFUL OF OUR BUDGETARY RESTRICTIONS AS WELL AND, YOU KNOW,
14 THAT'S WHERE THAT SALARY SURVEY DATA COMES INTO EFFECT.

15 IT'S IMPERATIVE AND THE STATUTE REQUIRES THAT WE
16 CONSIDER SALARY SURVEY DATA, WHICH IS BASICALLY COMPARING OUR
17 RATES OF PAY TO COMPARABLE RATES OF PAY IN THE LOCAL LABOR
18 MARKET AREA.

19 Q AND I WAS JUST THINKING ABOUT ANOTHER QUESTION THAT MR.
20 IRVIN RAISED ABOUT THIS EQUALIZING PAY. AND IN THE INCIDENCE
21 THAT HE WAS TALKING ABOUT -- LET'S SEE IF I'VE GOT THAT
22 EXHIBIT NUMBER UP HERE...

23 WOULD YOU LOOK AT PLAINTIFF'S EXHIBIT NUMBER 12?

24 A YES, I SEE IT.

25 Q IT SAYS HERE THAT THERE'S -- THESE ARE THE

1 NOVEMBER 10TH, 2016 PAY RAISES. YOU REMEMBER THE TESTIMONY
2 ABOUT IS THAT ONE OF THE DOCTORS CAME IN WITH AN OFFER FROM A
3 DOWNTOWN GROUP --

4 A YES.

5 Q -- THAT WANTED TO PAY HIM \$300,000?

6 A YES.

7 Q AND DR. MILLER WAS -- WANTED TO KEEP HIS STAFF TOGETHER.

8 A CORRECT.

9 Q AND HE RECOMMENDED PAY FOR EACH OF HIS PHYSICIANS FOR
10 \$300,000.

11 A YES.

12 Q AND HE SAYS HE WANTED TO BE SURE THERE WAS NO PAY
13 DISPARITY. WHAT DO YOU THINK OF THAT?

14 A WELL, I ACTUALLY THINK THAT IT IS A PROACTIVE MOVE. I
15 THINK THAT IT WOULD HAVE BEEN -- HAD -- I'M SORRY, IS HIS
16 NAME DR. MILLER? IS THAT -- IF DR. MILLER HAD ONLY ENSURED
17 AND REVIEWED THE PHYSICIAN THAT HAD THE COMPETING OFFER, THEN
18 OBVIOUSLY -- HE OBVIOUSLY, AS A SERVICE CHIEF I BELIEVE IT'S
19 IMPERATIVE THAT HE LOOK AT ALL OF HIS PHYSICIANS AND ENSURE
20 THAT THEY ALL HAVE COMPETITIVE AND COMPARABLE RATES OF PAY.

21 I MEAN, OBVIOUSLY IN THIS EXAMPLE DORN MEDICAL CENTER
22 HAS A PRIVATE SECTOR COMPETITOR THAT'S TRYING TO RECRUIT
23 THEIR ANESTHESIOLOGISTS. SO IF IT WEREN'T THIS -- THIS
24 INDIVIDUAL PHYSICIAN, MY GUESS IS THEY WOULD HAVE TRIED TO
25 CONTACT ANOTHER ANESTHESIOLOGIST TO RECRUIT.

1 SO TO ME THIS IS A PROACTIVE APPROACH. AND IF HE WAS
2 GOING TO REVIEW ONE, IT WOULD BE APPROPRIATE TO REVIEW THEM
3 ALL TO ENSURE THAT THE PAY IS FAIR AND EQUITABLE WITHIN THE
4 SERVICE.

5 Q AND NOW IN -- DURING THIS TRIAL, WHICH HAS GONE ON FOR A
6 DAY AND A HALF NOW, HAVE YOU HEARD ANY SUGGESTION OF A BETTER
7 WAY TO DO THE PAY THAN THE WAY THE VA DOES?

8 A NO. I HAVE HEARD A LOT ABOUT THE PROCESS, THE WAY WE
9 COMPLETE THESE FORMS, AND I DON'T THINK ANY OF THAT IS IN
10 VIOLATION OF STATUTE, BUT I -- AT THIS POINT I'M SATISFIED
11 WITH THE WAY THAT WE ARE -- WE ARE REVIEWING ANNUAL SALARY.
12 WE ARE COMPARING IT TO ANNUAL SALARY IN THE PRIVATE SECTOR IN
13 THE SAME LABOR MARKET.

14 WE ARE PROVIDING THAT INFORMATION TO THE COMPENSATION --
15 WELL, WE WERE -- TO THE COMPENSATION PANELS BACK IN WHEN WE
16 HAD COMPENSATION PANELS. THEY ARE LOOKING AT THAT
17 INFORMATION. THEY ARE LOOKING AT THE CRITERIA FOR EACH OF
18 THE PHYSICIANS THAT'S REQUIRED IN STATUTE TO REVIEW AND THEY
19 MAKE AN OVERALL RECOMMENDATION ON THE ANNUAL PAY.

20 NOW, PERSONALLY I, YOU KNOW, SAT HERE AND I HAVE HEARD
21 THE DISCUSSION, DISAGREEMENT OR DISCUSSION, ABOUT THE WAY
22 THAT WE COMPLETE THESE FORMS. BUT IN REALITY WHEN YOU LOOK
23 AT THE WAY OUR PAY SYSTEM IS OUTLINED IN STATUTE AND IN
24 POLICY, WE HAVE TWO COMPONENTS OF PAY. ONE IS DISCRETIONARY.
25 ONE IS NON-DISCRETIONARY. THE BASE AND LONGEVITY PAY IS NOT

1 GOING TO CHANGE BASED ON A RECOMMENDATION OF AN INCREASE OR
2 DECREASE BY A COMPENSATION PANEL. IT CAN'T BY LAW.

3 SO WHEN OUR PAY PANELS ARE LOOKING AT RECOMMENDING PAY
4 FOR PHYSICIANS AND THEY ARE LOOKING -- WE ARE COMPARING
5 ANNUAL PAY TO ANNUAL PAY IN THE COMMUNITY, WE DON'T HAVE
6 SURVEY DATA IN THE COMMUNITY BECAUSE PRIVATE SECTOR
7 PHYSICIANS DON'T HAVE A MARKET PAY COMPONENT AND A BASE
8 COMPONENT, SO WE ARE UNABLE TO COMPARE SOLELY MARKET PAY TO
9 ANNUAL SALARY.

10 SO WE COMPARE ANNUAL SALARIES TO ANNUAL SALARIES. THE
11 COMPENSATION PANEL MAKES ITS RECOMMENDATIONS AND THEN, YES,
12 IT IS -- BUT YOU KNOW, BY VIRTUE OF THAT ANNUAL PAY, THE ONLY
13 THING THAT WE CAN MAKE A RECOMMENDATION ON AND CHANGE IS THE
14 MARKET PAY.

15 SO, I DON'T BELIEVE THAT WE ARE VIOLATING THE STATUTE
16 JUST BECAUSE WE ASK OUR PHYSICIANS TO RECOMMEND ANNUAL PAY
17 BECAUSE WHAT THEY ARE DOING IN -- BASICALLY IS RECOMMENDING
18 EITHER AN -- IS RECOMMENDING AN INCREASE IN THEIR MARKET
19 PAY -- IN THE MARKET PAY COMPONENT BECAUSE THAT'S THE ONLY
20 COMPONENT WE CAN -- WE CAN CHANGE.

21 Q THANK YOU. PLEASE ANSWER ANY QUESTIONS MR. IRVIN MAY
22 HAVE.

23 MR. IRVIN: JUST BRIEFLY, YOUR HONOR.

24 REDIRECT EXAMINATION

25 BY MR. IRVIN:

1 Q I THINK I HEARD YOU SAY, YOU AND MRS. BAILEY SAY
2 SOMETHING ABOUT AN ANNUAL PAY THAT YOU THOUGHT DR. KENNEDY
3 MIGHT BE SEEKING OR THAT SOMEHOW OR ANOTHER CAME ABOUT OF
4 \$426,000. WHERE DID THAT NUMBER COME FROM?

5 A I THINK WHAT SHE WAS -- MRS. BAILEY WAS SAYING WAS IF WE
6 USED SURVEY DATA AND ONLY -- AND USED THAT DATA AND USED THAT
7 DATA TO CHANGE -- INSTEAD OF COMPARING IT TO THE ANNUAL PAY,
8 WE USED IT TO INCREASE JUST THE MARKET PAY ONLY WITHOUT, YOU
9 KNOW, WITHOUT REGARD TO HOW MUCH BASE AND LONGEVITY PAY A
10 PHYSICIAN IS MAKING, THAT THAT WOULD CREATE POTENTIALLY MUCH
11 HIGHER RATES FOR OUR PHYSICIANS.

12 Q \$426,000? IS THAT WHAT YOU THINK DR. KENNEDY IS ASKING
13 THE COURT TO DETERMINE IS HIS ANNUAL--

14 A NO, THAT WASN'T THE QUESTION SHE ASKED ME. SHE WAS
15 ASKING ME ABOUT THIS PROCESS IF WE ONLY APPLIED THAT \$300,000
16 THAT'S IN THE COMMUNITY TO THE MARKET PAY COMPONENT IN THAT
17 CALCULATION.

18 Q OH, I SEE. BUT THAT WOULDN'T BE--

19 A AND THEN ADDING HIS BASE AND LONGEVITY PAY ON TOP OF
20 THAT.

21 Q I SEE WHAT--

22 A HOW THAT METHOD WOULD SKEW--

23 Q YEAH. IT WOULD SKEW BECAUSE YOU WOULDN'T BE COMPARING
24 APPLE TO APPLES; RIGHT?

25 A WELL, AND THAT'S -- WE ARE NOT COMPARING APPLES TO

1 APPLES IF WE ARE TRYING TO COMPARE JUST OUR MARKET PAY TO
2 ANNUAL SALARIES IN THE COMMUNITY EITHER.

3 Q RIGHT. BUT WHEN YOU'RE TRYING TO COMPARE YOUR ANNUAL
4 PAY TO SALARIES IN THE COMMUNITY AND THE HAY DATA AND SO
5 FORTH, THAT'S WHERE IT'S APPLES TO APPLES.

6 A WHEN WE ARE COMPARING ANNUAL PAY, YES, TO THE ANNUAL PAY
7 IN THE COMMUNITY.

8 Q RIGHT, WHICH IS WHAT THE HAY DATA GIVES YOU. IT GIVES
9 YOU --

10 A CORRECT.

11 Q -- ANNUAL PAY BECAUSE PRIVATE MARKET DOESN'T BREAK IT
12 OUT INTO BASE PAY AND MARKET PAY; DO THEY?

13 A NO, THEY DON'T.

14 Q OKAY. THANK YOU.

15 THE COURT: I HAD A COUPLE OF QUESTIONS.

16 THE WITNESS: YES.

17 THE COURT: THE SEVEN FACTORS THAT ARE LISTED ON
18 THE COMPENSATION PANEL REVIEW FORMS, WHO PREPARES THOSE, THAT
19 LIST?

20 THE WITNESS: TYPICALLY THE SERVICE CHIEF WOULD DO
21 THAT. THE SERVICE CHIEF IS THE ONE THAT HAS THE MOST
22 INFORMATION ON THEIR -- THE INDIVIDUAL PHYSICIANS THAT THEY
23 SUPERVISE, SO THEY WOULD HAVE INFORMATION ON THEIR
24 EXPERIENCE, THEIR QUALIFICATIONS, ANY TYPE OF -- WHERE THE
25 BOARD CERTIFICATIONS, THE NEED FOR THAT SPECIALTY AT THAT

1 FACILITY.

2 THE COURT: SO THE SERVICE CHIEF TAKES INTO
3 CONSIDERATION THE SEVEN FACTORS AND INDICATES THAT HE'S
4 TAKING THOSE INTO CONSIDERATION WITH THAT ATTACHMENT.

5 THE WITNESS: YES.

6 THE COURT: THEN HE PRESENTS THAT TO THE PANEL.

7 THE WITNESS: YES.

8 THE COURT: AND THE PANEL DOESN'T INDEPENDENTLY
9 LOOK AT THOSE MARKET FACTORS; IS THAT CORRECT?

10 THE WITNESS: THE PANEL LOOKS AT WHAT'S PROVIDED BY
11 THE SERVICE, SERVICE LINE CHIEF.

12 THE COURT: BUT THEY DON'T DO AN INDEPENDENT
13 ANALYSIS OF THE MARKET OR ANYTHING LIKE THAT?

14 THE WITNESS: THEY SHOULD BE PROVIDED MARKET DATA
15 TO REVIEW EITHER BY THE SERVICE CHIEF OR BY HUMAN RESOURCES.
16 THEY ARE REQUIRED TO LOOK AT COMPARABLE RATES OF PAY IN THE
17 COMMUNITY WHEN MAKING THEIR RECOMMENDATIONS.

18 THE COURT: SO DOES THE SERVICE CHIEF PRESENT THEM
19 WHAT THE COMPARABLE RATES ARE OR DO THEY INDEPENDENTLY LOOK
20 AT THE COMPARABLE RATES OF PAY?

21 THE WITNESS: EITHER THE SERVICE CHIEF WOULD GET
22 THAT INFORMATION FROM HR OR HR WOULD BE THERE TO PROVIDE THAT
23 INFORMATION. AND AGAIN, THAT INFORMATION IS PROVIDED IN THE
24 FORM -- TYPICALLY WOULD BE PROVIDED THROUGH ONE OF THE MANY
25 DIFFERENT SURVEY DATA PRODUCTS THAT VA PURCHASES.

1 THE COURT: SO THE ANNUAL PAY IS THE BASE PAY PLUS
2 THE MARKET PAY. AND THE ONLY VARIABLE YOU HAVE IN THAT IS
3 MARKET. THE BASE PAY DOESN'T -- YOU CAN'T -- CAN'T VARY
4 THAT.

5 THE WITNESS: THAT'S CORRECT.

6 THE COURT: SO, WHY DO YOU -- WHY IS THERE A NEED
7 FOR THE BASE PAY IF THE MARKET PAY CAN BE MANIPULATED
8 REGARDLESS OF LONGEVITY OR TIME AT THE VA? SEEMS LIKE YOU
9 SHOULD JUST LOOK AT MARKET PAY AND SAY WE ARE GOING TO PAY
10 EVERYBODY \$300,000.

11 THE WITNESS: WELL, THAT--

12 THE COURT: SO WHAT DOES THE BASE PAY MEAN?

13 THE WITNESS: THE BASE PAY IS -- THIS PAY SYSTEM
14 WAS IMPLEMENTED IN 2006, AND SO SIMILAR -- THE SAME THING WE
15 HAVE, FOR EXAMPLE, IN THE GENERAL SCHEDULE IN THE GENERAL --
16 AT LEAST WE HAVE IN THE GENERAL SCHEDULE, WE HAVE IT IN THE
17 FEDERAL WAGE SYSTEM, WE HAVE IT IN THE NURSE LOCALITY PAY
18 SYSTEM. IT'S IN STATUTE.

19 TYPICALLY AT THIS TIME FEDERAL WAGES HAVE A PAY SCALE
20 THAT'S ATTACHED, AND SO THAT BASE AND LONGEVITY SCHEDULE IS
21 ESSENTIALLY A BASE PAY STRUCTURE, A BASE CHART, AND ON THAT
22 WE ADD THE MARKET PAY.

23 THE BASE AND LONGEVITY PAY SCHEDULE WAS NEVER INTENDED I
24 BELIEVE TO BE, YOU KNOW, THE SOLE SOURCE OF COMPENSATION, BUT
25 IT DOES -- THE ONE -- THE ONE BENEFIT THAT THE BASE AND

1 LONGEVITY PAY SYSTEM DOES IS IT REWARDS EMPLOYEES EVERY TWO
2 YEARS FOR THEIR TIME THAT THEY SPEND IN VHA SERVICE; SO
3 SIMILAR TO HOW WE GO UP IN STEPS IN THE GENERAL SCHEDULE.

4 THE COURT: OKAY. BUT STILL, A PERSON WHO HAS BEEN
5 THERE FOR 20 YEARS COULD STILL END UP MAKING THE SAME AS
6 SOMEBODY WHO HAS BEEN THERE FOR FIVE YEARS IF THE MARKET WILL
7 SUPPORT IT.

8 THE WITNESS: ABSOLUTELY. BUT THAT'S ABSOLUTELY
9 ESSENTIAL FOR VA. WE ARE FORTUNATE IN VA THAT WE'RE OFTEN
10 ABLE -- AND I THINK WE HAVE TALKED ABOUT THIS PREVIOUSLY --
11 WE ARE OFTEN ABLE TO ATTRACT PHYSICIANS THAT MAYBE HAVE
12 ALREADY LEFT PRIVATE PRACTICE. AFTER 20, 25 YEARS, THEY
13 RETIRED AND THEY HAVE A DESIRE TO COME WORK FOR VA.

14 IF SO, WE HAVE TO HAVE A SYSTEM BY WHICH -- BECAUSE THAT
15 PHYSICIAN WILL HAVE TO START AT STEP ONE, WHICH IS ABOUT
16 \$101,000. WE HAVE TO HAVE A MECHANISM BY WHICH WE CAN STILL
17 RECRUIT AND RETAIN THAT VERY HIGHLY-PRIZED, PROFICIENT,
18 SPECIALIZED PHYSICIAN AND WE DO THAT BY THE MARKET PAY
19 COMPONENT.

20 THE COURT: A NUMBER OF THE PEOPLE OR DOCTORS ON
21 THE COMPENSATION PANEL HAVE TESTIFIED THAT THEY WERE ONLY
22 LOOKING AT ANNUAL PAY; THAT'S WHAT THEY WERE GOING TO MAKE A
23 RECOMMENDATION ON. HOW HAVE THEY COMPLIED WITH THE
24 REGULATIONS IN THE STATUTE IF THEY ONLY LOOK AT ANNUAL PAY?

25 THE WITNESS: WELL, I BELIEVE THAT WE ARE STILL

1 MEETING THE STATUTE. IN REALITY WHEN THEY'RE -- WHEN THEY
2 ARE REVIEWING AND MAKING A RECOMMENDATION FOR ANNUAL PAY,
3 THEY ARE IN ESSENCE ONLY ABLE TO INCREASE MARKET PAY AS A
4 COMPONENT OF THAT ANNUAL PAY.

5 SO FOR EXAMPLE -- AND I'LL BE VERY JUST DOWN-TO-EARTH
6 HERE. WHEN PHYSICIANS COME IN AND THEY LEAVE THEIR CLINICAL
7 PRACTICE AND THEY COME IN AND DO THESE ADMINISTRATIVE ROLES
8 OF RECOMMENDING PAY, THEY DON'T NECESSARILY -- AS THEY HAVE
9 SAID, THEY DON'T NECESSARILY UNDERSTAND THE BASE AND
10 LONGEVITY PAY AND THAT, YOU KNOW, WHAT THE STEPS ARE AND WHEN
11 SOMEBODY IS GOING TO MOVE UP AND DOWN.

12 SO IN VA I BELIEVE THAT BECAUSE WE SAY WE DON'T EXPECT
13 THEM TO HAVE TO KEEP UP WITH THE BASE AND LONGEVITY AND
14 MARKET PAY, WE EXPECT THEM TO COMPARE, YOU KNOW, WHAT'S A
15 COMPARABLE ANNUAL SALARY FOR THIS PHYSICIAN BASED ON THE
16 MARKET DATA, THE COMPARABLE DATA THAT'S IN THE COMMUNITY, AND
17 YOU MAKE THAT RECOMMENDATION.

18 THAT RECOMMENDATION GOES TO HR AND HR THEN SITS DOWN
19 WITH THAT CALCULATION AND SAYS OKAY, THIS DOCTOR'S MAKING 140
20 IN BASE PAY, THEREFORE TO GET TO 300 THIS IS WHAT THE MARKET
21 PAY WILL BE.

22 THE COURT: IT SEEMS TO ME THAT THE FORMULA MAY BE
23 FLAWED BECAUSE IT SEEMS TO ME THE ANNUAL PAY IS BASICALLY THE
24 MARKET PAY.

25 THE WITNESS: NO. THE ANNUAL PAY IS NOT JUST

1 MARKET PAY, IT'S ALSO BASE PAY. ANNUAL PAY IS THE SUM OF
2 YOUR BASIC PAY THAT, AGAIN, WE HAVE NO CONTROL OVER HOW MUCH
3 MARKET -- I'M SORRY -- ANNUAL PAY. BASE PAY YOU'RE GOING TO
4 RECEIVE, SO IT'S THE -- IT'S THE COMP -- THE BASE PLUS YOUR
5 MARKET EQUALS YOUR ANNUAL SALARY.

6 SO WHEN A COMPENSATION PANEL IS MAKING A RECOMMENDATION
7 TO INCREASE SOMEONE'S PAY BY \$20,000, THEY ARE ACTUALLY
8 INCREASING THE MARKET PAY BY 20,000.

9 THE COURT: SO THEN MAYBE IT'S NOT THE MARKET PAY,
10 IT'S -- BECAUSE IF THE MARKET PAY IS 300,000, IF THAT'S WHAT
11 THE MARKET PAY IS, THEN THE ANNUAL IS NOT THE BASE PLUS THE
12 MARKET PAY, THE ANNUAL IS THE BASE PLUS SOME OTHER FACTOR
13 THAT TAKES INTO CONSIDERATION THE MARKET.

14 THE WITNESS: AND WHEN YOU SAY MARKET PAY, ARE YOU
15 REFERRING TO THAT AS THE RATES OF PAY PAID IN THE COMMUNITY?

16 THE COURT: LIKE YOU HAVE ON TABLE FOUR, YEAH.
17 THAT'S WHAT I'M THINKING OF.

18 THE WITNESS: NO, THE PAY TABLES --

19 THE COURT: YES.

20 THE WITNESS: -- ARE THE BASE PLUS THE MARKET
21 AMOUNTS. SO WHEN YOU SEE 325 IS THE HIGHEST FOR PAY TABLE
22 FOUR, THAT'S THE HIGHEST ANNUAL PAY, SO THAT WOULD INCLUDE A
23 PHYSICIAN'S BASE AND ANY MARKET PAY THEY RECEIVED.

24 THE COURT: BUT HOW DO YOU DETERMINE WHERE IN THAT
25 RANGE THE MARKET PAY SHOULD BE USING THOSE FACTORS? IT SEEMS

1 IT'S VERY ARBITRARY. IT'S JUST BASICALLY WHATEVER IT IS TO
2 GET YOU TO A CERTAIN NUMBER. IT'S NOT BASED ON THE FACTORS.

3 THE WITNESS: WELL, BUT THE -- BUT THOSE
4 COMPENSATION PANELS, THEY'RE STILL CONSIDERING ALL THOSE
5 FACTORS TO -- AND APPLYING THOSE FACTORS TO THOSE, TO THAT
6 INDIVIDUAL PHYSICIAN THAT THEY ARE REVIEWING.

7 THE COURT: WELL, HOW CAN THEY DO THAT? FOR
8 EXAMPLE, IF YOU HAD A DOCTOR THAT STARTED AT A BASE -- HAD A
9 BASE PAY OF \$100,000 AND YOU HAD ANOTHER DOCTOR THAT HAD A
10 BASE PAY OF \$200,000 BECAUSE HE HAD BEEN THERE FOR 20 YEARS
11 AND THE OTHER GUY HAD ONLY BEEN THERE FOR 10 YEARS, BUT THE
12 MARKET NOW IS \$300,000.

13 SO YOU'RE GOING TO INCREASE THE 20-YEAR DOCTOR BY
14 \$100,000 AND THE 10-YEAR DOCTOR BY \$200,000. SO, HOW IS THAT
15 TAKING INTO CONSIDERATION THE LENGTH OF TIME THEY HAVE BEEN
16 THERE AND ALL THOSE OTHER FACTORS?

17 THE WITNESS: WELL, THE LENGTH OF TIME IS ALREADY
18 FACTORED INTO THAT BASED ON THEIR BASE AND LONGEVITY PAY.
19 SO...

20 THE COURT: SO THE PERSON WHO HAS BEEN THERE FOR 20
21 YEARS GETS LESS MONEY THAN THE --

22 THE WITNESS: WELL--

23 THE COURT: -- IN THE MARKET INCREASE THAN THE
24 PERSON WHO HAS BEEN THERE FOR 10 YEARS.

25 THE WITNESS: THE PERSON THAT'S BEEN THERE FOR 20

1 YEARS GETS MORE BASE AND LONGEVITY AND PROPORTIONATELY LESS
2 MARKET SO THAT THEY HAVE A 300,000.

3 THE COURT: SO IT REALLY DOESN'T MATTER HOW LONG
4 YOU HAVE BEEN THERE. YOU'RE GOING TO END UP MAKING THE SAME
5 THING ANY WAY.

6 THE WITNESS: IF -- IF PHYSICIANS ARE PAID THE
7 SAME, THAT -- YES, THAT -- WHICH IS WHY THERE -- THE
8 FLUCTUATION IS IN THE BASE AND LONGEVITY AS THEY CONTINUE TO
9 INCREASE UP THROUGH THE SCHEDULE.

10 THE COURT: OKAY. ALL RIGHT. ANYTHING ELSE?

11 MRS. BAILEY: YOUR HONOR, I HAVE ONE FOLLOW-UP
12 QUESTION.

13 RECROSS-EXAMINATION

14 BY MRS. BAILEY:

15 Q MRS. DOTY, BEFORE THE PAY ACT WAS ADOPTED IN 2006, HOW
16 WERE PHYSICIANS PAID?

17 A THERE WAS A PAY SYSTEM CALLED PHYSICIAN AND DENTIST
18 SPECIAL PAY. SPECIAL PAY HAD SEVEN OR EIGHT COMPONENTS BUT
19 BASICALLY THE -- THERE WAS AN AMOUNT OF SPECIAL PAY THAT WAS
20 AUTHORIZED FOR A PHYSICIAN BASED ON HIS OR HER
21 RESPONSIBILITY, THE AMOUNT OF TIME THEY HAD BEEN IN THE VA,
22 IF THEY WERE IN A CARE SPECIALTY WHERE THEY WERE AT IN THE
23 COMMUNITY -- I'M SORRY -- IN THE LOCAL LABOR MARKET THAT SORT
24 OF THERE WAS A FACILITY-SPECIFIC COMPONENT AND THEN THAT
25 AMOUNT OF SPECIAL PAY WAS ADDED TO -- PHYSICIANS WERE PAID

1 OFF OF THE GS BASE PAY CHART, TYPICALLY AT A GS15, SO
2 WHATEVER RATE AND STEP THEY WERE ON, THAT SPECIAL PAY AMOUNT
3 WAS ADDED TO THEIR BASE PAY.

4 Q SO HOW DID THE 2000 ACT CHANGE THAT?

5 A IT CHANGED IT DRAMATICALLY IN THE FACT THAT IT REMOVED
6 ALL OF THE DIFFERENT VARIABLE SPECIAL RATE, SPECIAL PAY
7 COMPONENTS THAT ALL -- WE HAD SEVEN OR EIGHT COMPONENTS AND
8 EACH OF THOSE COMPONENTS HAD MINIMUM AND MAXIMUM, SO IT DID
9 AWAY WITH THAT.

10 IT KEPT THE CONCEPT OF HAVING THE BASE PAY SCHEDULE THAT
11 REWARDS A PHYSICIAN OR DENTIST AND ALLOWS THEM TO MOVE UP
12 INCREMENTALLY EVERY TWO YEARS, SO IT STILL ALLOWS FOR A
13 GUARANTEED, IF YOU WILL, STEP INCREASE AND INCREASE IN PAY,
14 AND THEN IT ADDED, YOU KNOW, THE MARKET PAY COMPONENT.

15 Q YOU KNOW, I WONDER ABOUT THE AFFECT OF THAT ON JUST AN
16 INDIVIDUAL PHYSICIAN'S SALARY. WE ARE GOING TO HAVE
17 TESTIMONY THAT WHEN DR. KENNEDY FIRST CAME WITH THE VA, HE
18 WAS MAKING WELL UNDER A HUNDRED THOUSAND DOLLARS YET WHEN THE
19 PAY ACT--

20 THE COURT: WAIT A MINUTE. WAIT A MINUTE. YOU
21 SAID YOU'RE GOING TO HAVE TESTIMONY OR YOU ALREADY HAVE
22 TESTIMONY?

23 MRS. BAILEY: GOING TO.

24 THE COURT: WELL, YOU CAN'T TESTIFY ABOUT SOMETHING
25 THAT HASN'T HAPPENED YET.

1 MRS. BAILEY: OKAY. WELL, LET ME JUST ASK YOU.

2 THE COURT: OKAY.

3 BY MRS. BAILEY:

4 Q IF THERE WERE TESTIMONY THAT DR. KENNEDY WAS MAKING
5 UNDER A HUNDRED THOUSAND DOLLARS--

6 THE COURT: I DON'T THINK YOU CAN ASK HER A
7 HYPOTHETICAL, EITHER. SHE'S NOT AN EXPERT, SO YOU...

8 BY MRS. BAILEY:

9 Q HOW ABOUT WHAT AFFECT DID THE PAY ACT HAVE ON PHYSICIANS
10 WHO WERE CURRENTLY EMPLOYED WHEN IT WAS ENACTED OR BECAME
11 OPERATIONAL?

12 A WHEN IT WAS FIRST ENACTED, PHYSICIANS WERE CONVERTED
13 FROM SPECIAL PAY TO THE NEW VH -- WELL, THE NEW THEN VHA
14 PHYSICIAN AND DENTIST PAY SYSTEM AT THEIR EXISTING RATE OF
15 PAY AND THEN THEY WERE ALL -- WITHIN A YEAR I BELIEVE THE
16 DATE WAS -- THEY WERE ALL REQUIRED TO GO TO AN INITIAL
17 COMPENSATION PANEL, HAVE THEIR PAY REVIEWED AND DETERMINE
18 WHETHER, YOU KNOW, ANY ADDITIONAL MARKET PAY SHOULD BE ADDED.

19 Q SO THE MARKET PAY WAS ADDED TO THAT BASE PAY?

20 A TO THE BASE AND LONGEVITY PAY, YES.

21 Q I'D ALSO LIKE TO TAKE A LOOK AT WHAT'S BEEN IDENTIFIED
22 AS PLAINTIFF'S EXHIBIT NUMBER 12 AND GO BACK TO THE THIRD
23 PAGE OF -- FOURTH PAGE OF THAT, PAGE 102. AND WE HAVE HAD
24 TESTIMONY THAT EXHIBIT 12 IS THE COMPENSATION PANEL DATA FROM
25 NOVEMBER OF 2016.

1 A IT'S THE HAY GROUP SURVEY DATA FROM 2015, YES.

2 Q SO THIS WAS -- LOOKING AT EXHIBIT 12, WAS THIS ATTACHED
3 TO THE COMPENSATION PANEL'S MATERIAL?

4 A I BELIEVE IT WAS.

5 Q THANK YOU.

6 MR. IRVIN: WE ARE GOING TO FINISH.

7 REDIRECT EXAMINATION

8 BY MR. IRVIN:

9 Q JUST -- YOU HAVE EXHIBIT 12 THERE IN FRONT OF YOU; DON'T
10 YOU?

11 A YES. THIS IS THE SURVEY, THE HAY SURVEY?

12 Q YES.

13 A YES.

14 Q WELL, THE WHOLE PACKAGE OF THESE NOVEMBER--

15 A YES. I'M SORRY. I DIDN'T REALIZE -- OKAY. I DIDN'T
16 REALIZE THIS WAS A CONTINUAL PACKAGE. YES.

17 Q WELL, I JUST WANT TO MAKE SURE THAT WE ARE CLEAR ON THIS
18 POINT. LONGEVITY AT THE VA OR TENURE -- I GUESS WE CALL IT
19 LONGEVITY -- BUT THE NUMBER OF YEARS THAT A PHYSICIAN HAS
20 BEEN AT THE VA AS A PHYSICIAN.

21 A YES.

22 Q THAT LONGEVITY IS THE SUBJECT OF THAT BASE PAY AND THE
23 LONGEVITY TABLE AND YOU ARE WHAT YOU ARE AND...

24 A CORRECT.

25 Q BASED ON THE NUMBER OF YEARS THAT YOU'RE -- BEEN THERE

1 20 YEARS, YOU GET MORE THAN YOU -- THAN IF YOU HAD BEEN THERE
2 ON -- SOMEBODY BEEN THERE ON 10 YEARS.

3 A CORRECT.

4 Q BUT THAT SAME LONGEVITY OR TENURE IS RECOGNIZED AND IS
5 TO BE GIVEN CREDIT IN THE MARKET PAY PORTION AS WELL UNDER
6 FACTOR SIX WHICH IS PRIOR VHA EXPERIENCE; IS THAT CORRECT?

7 A I THINK NOT IN ADDITION TO, BUT IT SHOULD BE CONSIDERED.

8 Q WELL NOW, IF YOU LOOK AT 12 WITH ME -- AND I'M LOOKING
9 HERE AT DR. ALGHOTHANI ON TOP. AND THEN YOU FLIP OVER TO THE
10 THIRD PAGE AND THAT'S THE TYPED-UP SHEET THAT'S GOT
11 PARAGRAPHS ONE THROUGH SEVEN. AND YOU SEE WHERE SIX FOR DR.
12 ALGHOTHANI IS -- THIS IS THE LANGUAGE THAT'S IN THIS THING
13 THAT DR. MILLER APPARENTLY DID AND BROUGHT TO THE PANEL
14 REVIEW FOR -- HERE'S THE INFO --

15 A RIGHT.

16 Q -- ON FACTOR NUMBER SIX WHICH IS PRIOR VHA EXPERIENCE.
17 AND THE INFO THAT HE GAVE THE PANEL WAS THAT DR. ALGHOTHANI
18 HAD BEEN THERE FOR A YEAR; RIGHT?

19 A RIGHT.

20 Q AND THEN IF YOU FLIP OVER TO KENNEDY RFP106 IN THAT
21 EXHIBIT, THE INFO THAT DR. MILLER GAVE THE PANEL FOR DR.
22 KENNEDY IS DR. KENNEDY HAS 20 YEARS EXPERIENCE AT THE VA.
23 SEE THAT?

24 A NOT YET, BUT IT'S COMING UP.

25 Q OKAY. AND SO -- AND SO THAT IS -- THAT FACTOR, FACTOR

1 NUMBER SIX, IS BASED ON LONGEVITY AT THE VA; CORRECT?

2 A CORRECT.

3 RECROSS-EXAMINATION

4 BY MRS. BAILEY:

5 Q ONE LAST QUESTION. MRS. DOTY, IS THERE ANY REQUIREMENT
6 AS TO THE WAY THAT PANELS GIVE TO ANY OF THESE SEVEN FACTORS?

7 A NO.

8 Q ALL RIGHT.

9 THE COURT: I'M GOING TO ASK ONE MORE QUESTION. I
10 JUST WANT TO UNDERSTAND. IF YOU LOOK AT PAGE 106 AND YOU GO
11 BACK AND YOU LOOK AT PAGE -- JUST WANT TO MAKE SURE I
12 UNDERSTAND -- 10 -- WHAT'S THE ONE FOR DR. KENNEDY? THE 101
13 IS DR. ALGHOTHANI AND PAGE 106 IS DR. KENNEDY.

14 AND DR. KENNEDY GOT AN INCREASE OR GOT -- WAIT. DR.
15 ALGHOTHANI GOT A \$195,678 FIGURE FOR HIS MARKET AND DR.
16 KENNEDY GOT 168,000 --

17 THE WITNESS: UH-HUH.

18 THE COURT: -- 758 FOR HIS MARKET RATE.

19 THE WITNESS: UH-HUH.

20 THE COURT: IF WE GO THROUGH THE TWO OF THEM AND WE
21 LOOK AT -- COMPARE NUMBER ONE, DR. ALGHOTHANI HAS 17 YEARS
22 AND DR. KENNEDY HAS 20. THE NEED TO RETAIN IS THE SAME
23 FOR -- ONE AND TWO IS THE SAME FOR BOTH. THE MARKET PAY
24 DETERMINATION IS THE SAME FOR BOTH, BUT IT WAS BASED ON 331
25 AND 306.

1 DR. ALGHOTHANI IS A BOARD CERTIFIED ANESTHESIOLOGIST
2 WITH 17 YEARS EXPERIENCE. AND NUMBER FOUR, DR. KENNEDY IS A
3 BOARD CERTIFIED ANESTHESIOLOGIST WITH 17 YEARS. SO THAT'S
4 THE SAME.

5 NUMBER FIVE, DR. ALGHOTHANI IS WELL-QUALIFIED, HAS HAD
6 SEVERAL POSITIONS OF RESPONSIBILITY. IS THE SAME FOR DR.
7 KENNEDY. DR. ALGHOTHANI'S PROFICIENT WILL BE ANESTHESIOLOGY
8 AND ROBOTIC SURGERY, VASCULAR CASES AND ULTRASOUND.

9 DR. KENNEDY HAS BEEN THE CHIEF, ACTING CHIEF, HE'S
10 COMPLETED AN INTERNSHIP AND A RESIDENCY AT RICHLAND MEMORIAL
11 AND POSSESSES SOME OF THE MOST UNIQUE SKILLS AND COMPETENCIES
12 FOR THIS PROFESSION. AND NUMBER SIX, KENNEDY HAS 20 YEARS,
13 ALGHOTHANI HAS ONE. SEVEN, ALGHOTHANI HAS COMPLETED AN
14 INTERNSHIP. AND THEN IT GOES ON FOR SEVEN FOR KENNEDY, HE'S
15 SIX MONTHS.

16 SO IT -- IF I WERE COMPARING THE TWO, I WOULD SAY DR.
17 KENNEDY'S FACTORS WERE HIGHER THAN DR. ALGHOTHANI YET DR.
18 ALGHOTHANI GOT A HIGHER MARKET RATE THAN DR. KENNEDY. WHY --
19 HOW DOES THAT HAPPEN?

20 THE WITNESS: THAT'S BECAUSE DR. KENNEDY HAS A MUCH
21 HIGHER BASE RATE. SO IF WE ARBITRARILY ADDED THAT HIGHER
22 MARKET PAY RATE THAT DR -- I'M SORRY, I DON'T KNOW HOW --
23 ALGHOTHANI RECEIVED TO DR. KENNEDY'S MUCH HIGHER BASE AND
24 LONGEVITY RATE, THEN THAT WOULD PUT DR. KENNEDY UP TO LIKE
25 320 OR 330, SO THEN HE WOULD BE MAKING MUCH MORE.

1 THE COURT: SO MARKET RATE IS NOT BASED ON THESE
2 FACTORS BECAUSE IF YOU WERE JUST TO BASE MARKET RATE ON THE
3 THINGS THAT THEY HAVE DONE AND THE THINGS THAT THEY HAVE
4 ACCOMPLISHED, DR. KENNEDY'S MARKET RATE OR VALUE WOULD APPEAR
5 TO BE GREATER THAN DR. ALGHOTHANI'S BUT YOU HAVE TO TAKE INTO
6 CONSIDERATION THE BASE.

7 THE WITNESS: YES. OUR POLICY--

8 THE COURT: AND SO MARKET ISN'T -- THAT FIGURE, 195
9 AND 168, ISN'T MARKET BECAUSE IF IT WAS MARKET, DR. KENNEDY'S
10 WOULD BE HIGHER BECAUSE HE WOULD BE MORE VALUED IN THE MARKET
11 BECAUSE HIS SKILL LEVEL AND HIS EXPERIENCE IS MUCH GREATER.
12 BUT YOU HAVE TO TAKE THE MARKET, AND IF YOU ADD IT TO THE
13 BASE -- I'M NOT SURE HOW IT ALL WORKS OUT.

14 I THINK THE TERMINOLOGY IS INCORRECT. HOW YOU'RE
15 FIGURING IT ALL OUT IS NOT THE WAY YOU SAY IT IS BECAUSE -- I
16 MEAN, IT JUST DOESN'T MAKE SENSE TO ME.

17 THE WITNESS: AND I WISH I'M -- PERHAPS IT'S THAT
18 I'M NOT EXPLAINING IT CORRECTLY. WE BUILD THE MARKET PAY.
19 THE MARKET PAY IS USED SOLELY TO GET A PHYSICIAN FROM THEIR
20 BASE AND LONGEVITY PAY UP TO THE AMOUNT OF ANNUAL PAY THAT WE
21 NEED TO PAY THEM TO HAVE COMPARABLE RATES.

22 THE COURT: OKAY. THAT'S -- THAT'S WHAT I'M
23 HEARING MARKET PAY IS. MARKET PAY IS NOT THESE SEVEN
24 FACTORS.

25 THE WITNESS: MARKET PAY -- BUT IN REALITY WHEN WE

1 ARE REVIEWING EVERY PHYSICIAN, LOOKING AT THEM IN THESE
2 COMPENSATION PANELS USING THESE SEVEN FACTORS, FIGURING OUT
3 AN ANNUAL -- WE NEED TO BE ABLE TO COMPARE THEIR ANNUAL, WHAT
4 THEIR -- WHAT THEIR END RESULT IS GOING TO BE FOR THEIR
5 ANNUAL RATE OF PAY BECAUSE WE ARE COMPARING OUR ANNUAL PAY TO
6 ANNUAL PAY IN THE DORN COMMUNITY.

7 SO WHEN WE DO THAT, THE WAY THAT WE DO THAT, BECAUSE OF
8 THAT STATUTORY REQUIREMENT TO PAY BASE AND LONGEVITY --
9 BECAUSE ALL OF OUR PHYSICIANS HAVE DIFFERENT BASE AND
10 LONGEVITY PAY AMOUNTS. WE HAVE TO VARY THE AMOUNT OF MARKET
11 PAY THAT THEY ARE RECEIVING BASED ON THEIR BASE AND LONGEVITY
12 SO THEY END UP AT THE AMOUNT OF ANNUAL SALARY THAT WE BELIEVE
13 IS COMPETITIVE FOR THEM.

14 THE COURT: NOW, I UNDERSTAND THE END RESULT. I
15 UNDERSTAND WHAT THE GOAL IS. I DON'T HAVE A PROBLEM WITH
16 THAT. YOU KNOW, YOU'RE TRYING TO GET EVERYBODY UP TO WHAT
17 THE MARKET IS. BUT I HAVE A PROBLEM WITH CALLING THAT FIGURE
18 MARKET PAY WHEN ACTUALLY IT'S NOT. THAT FIGURE IS A VARIABLE
19 TO GET A PERSON TO THE MARKET PAY.

20 THE WITNESS: WELL, I THINK THAT'S BECAUSE YOU'RE
21 CALLING MARK -- WE SOMETIMES CALL WHAT I'M REFERRING AS TO
22 ANNUAL SALARY IN THE COMMUNITY WE ALSO REFER TO THAT AS
23 MARKET PAY, AND SO THAT'S--

24 THE COURT: THAT WOULD MAKE SENSE TO ME. IF YOUR
25 ANNUAL SALARY IS YOUR MARKET PAY, THAT WOULD MAKE SENSE. BUT

1 I DON'T SEE HOW ANNUAL PAY IS MARKET PAY PLUS BASE PAY
2 BECAUSE MARKET PAY IS WHAT THE MARKET PAY WILL BEAR FOR THAT
3 PROFESSION.

4 THE WITNESS: WELL, WE--

5 THE COURT: AND I'M NOT -- I'M JUST TRYING TO
6 CLARIFY IT IN MY MIND WHAT IS GOING ON.

7 THE WITNESS: THE SURVEY DATA THAT WE COLLECT
8 DOESN'T SAY MARKET PAY, IT SAYS ANNUAL SALARIES IN THE
9 COMMUNITY.

10 THE COURT: OKAY.

11 THE WITNESS: WE REFER TO IT COMMONLY AS MARKET --
12 MARKET PAY OR MARKET-DRIVEN PAY.

13 MR. IRVIN: YOUR HONOR, COULD I ASK ONE MORE
14 QUESTION?

15 THE COURT: SURE.

16 REDIRECT EXAMINATION

17 BY MR. IRVIN:

18 Q MRS. DOTY, YOU INDICATED THAT IF YOU GAVE DR. KENNEDY
19 THE MARKET PAY DR. ALGHOTHANI HAD, IT WOULD PUT HIM UP TO
20 325. DR. KENNEDY I MEAN --

21 A SOMETHING.

22 Q -- 325. AND THAT WOULD BE WITHIN THE -- AT THE TOP OF
23 BUT WITHIN THE PAY RANGE THAT'S SHOWN ON THE ALGHOTHANI AND
24 KENNEDY'S COMP PANEL REVIEW FORMS. IT SAYS THE PAY RANGE IS
25 UP TO \$325,000; IS THAT CORRECT?

1 A THAT'S CORRECT.

2 Q OKAY.

3 A BUT THAT WOULD ALSO PUT HIM ABOVE WHAT'S COMMANDED IN
4 THE -- THE COMPARABLE PAY RATES IN THE COMMUNITY.

5 Q AND THAT WOULD TAKE INTO CONSIDERATION THE FACTOR OF
6 PRIOR VHA EXPERIENCE.

7 A THE BASE AND LONGEVITY PAY, YES.

8 Q WELL, THE PRIOR VHA EXPERIENCE THAT'S FACTOR NUMBER SIX
9 IN THE MANDATED FACTORS IN THE VA HANDBOOK FOR DETERMINATION
10 OF MARKET PAY; ISN'T THAT CORRECT?

11 A IT SAYS THAT YOU SHOULD CONSIDER THEIR BASE, THEIR
12 MARKET PAY, THE AMOUNT OF VA SERVICE THEY HAD, YES.

13 Q BUT IF YOU DON'T ADD SOMETHING IN, YOU'RE NOT
14 CONSIDERED?

15 A I DON'T UNDERSTAND YOUR THOUGHT PROCESS THERE.

16 Q THAT'S ALL. YOU DON'T GIVE HIM CREDIT FOR IT. YOU'RE
17 NOT--

18 A GIVE HIM CREDIT FOR IT THROUGH THE BASE AND LONGEVITY
19 PAY.

20 Q THANK YOU.

21 A YES.

22 MRS. BAILEY: ONE MORE?

23 THE WITNESS: OKAY. I DON'T BELIEVE Y'ALL ANY
24 MORE.

25 RECROSS-EXAMINATION

1 BY MRS. BAILEY:

2 Q EXHIBIT 12, WHICH WE HAVE BEEN TALKING ABOUT THE LAST
3 FEW MINUTES --

4 A UH-HUH.

5 Q -- PAGE 102. THIS IS THE HAY DATA.

6 A YES.

7 Q CAN YOU TELL FROM HERE WHAT THE ANNUAL PAY IN THE
8 COMMUNITY AROUND COLUMBIA FOR SURGEONS WAS?

9 A I THINK IT SAID MEDIAN WAS LIKE 304, TWO -- 304,200.
10 IT'S USUALLY A RANGE.

11 Q AND THEN THE NEXT PAGE IS THE -- ONE OF THOSE OTHER
12 SURVEYS YOU TALKED ABOUT?

13 A IT'S THE AAMC DATA.

14 Q AND WHAT DOES IT SAY FOR THE COLUMBIA COMMUNITY?

15 A YEAH. WE TYPICALLY, I BELIEVE -- AND I'D HAVE TO GO
16 BACK AND LOOK AT MY GUIDANCE ON AAMC DATA -- THINK WE
17 TYPICALLY USE ASSISTANT PROFESSOR DATA AND IT RANGES FROM --
18 THE MEAN IS 320.5 FOR GENERAL ANESTHESIA. THE 25TH
19 PERCENTILE IT'S 282. THE MEDIAN IS 320. THE 75TH PERCENTILE
20 IS 357.

21 Q THANK YOU.

22 THE COURT: THANK Y'ALL. I APPRECIATE IT.

23 THE WITNESS: I'M WAITING.

24 THE COURT: YOU'RE FINISHED.

25 (WITNESS LEFT THE STAND.)

1 THE COURT: ALL RIGHT. WE WILL TAKE A BREAK. YOUR
2 NEXT WITNESS WILL BE...

3 MR. IRVIN: DR. KENNEDY. AND I UNDERSTAND THAT'S
4 THE LAST WITNESS, YOUR HONOR, FOR EVERYBODY.

5 (BRIEF RECESS WAS TAKEN.)

6 THE COURT: NEXT WITNESS.

7 MR. IRVIN: THANK YOU, YOUR HONOR. WE CALL DR.
8 KENNEDY.

9 RICHARD KENNEDY, AFTER BEING DULY SWORN,
10 TESTIFIED AS FOLLOWS:

11 DIRECT EXAMINATION

12 BY MR. IRVIN:

13 Q HELLO, DR. KENNEDY. YOU'VE HAD A LONG RIDE TO THIS SEAT
14 IN THE WITNESS CHAIR HERE IN THE COURTROOM.

15 A THAT'S RIGHT.

16 Q LET ME ASK YOU -- YOU HAVE ALREADY GIVEN THE CLERK YOUR
17 NAME, BUT GIVE US YOUR FULL NAME AGAIN PLEASE, DR. KENNEDY.

18 A RICHARD MCKINNE KENNEDY, THE THIRD.

19 Q OKAY. HOW OLD ARE YOU, DR. KENNEDY?

20 A SIXTY-SEVEN.

21 Q OKAY. WHAT'S YOUR DATE OF BIRTH?

22 A MAY 29, 1951.

23 Q ALL RIGHT, SIR. AND DR. KENNEDY, I WANT TO FIND OUT A
24 LITTLE BIT ABOUT YOU AND SO THAT WE KNOW WHO YOU ARE. WHERE
25 WERE YOU BORN?

1 A BIRMINGHAM, ALABAMA.

2 Q ALL RIGHT. AND AT SOME POINT DID YOU MOVE TO SOUTH
3 CAROLINA?

4 A MY FAMILY SETTLED IN COLUMBIA IN 1963.

5 Q OKAY. AND AT THAT POINT YOU WOULD HAVE BEEN A YOUNG
6 FELLOW ABOUT 12 YEARS OLD THEN?

7 A YES.

8 Q ALL RIGHT. AND TELL US WHERE YOU RECEIVED YOUR
9 EDUCATION PRIOR TO GOING TO COLLEGE.

10 A I WENT TO PUBLIC SCHOOLS IN COLUMBIA AND FINISHED AT AC
11 FLORA HIGH SCHOOL IN 1969.

12 Q OKAY. AND I WANT TO TALK A LITTLE BIT MORE ABOUT YOUR
13 EDUCATION IN JUST A MOMENT, BUT LET ME ASK YOU A FEW MORE
14 KIND OF BASIC QUESTIONS. ARE YOU MARRIED?

15 A YES.

16 Q AND WHO ARE YOU MARRIED TO?

17 A KATHERINE KENNEDY.

18 Q ALL RIGHT. AND SHE'S HERE IN THE COURTROOM?

19 A YES.

20 Q SHE CAME THIS AFTERNOON. GOOD TIMING. ALL RIGHT. AND
21 DO YOU AND KATHY HAVE CHILDREN?

22 A YES.

23 Q ALL RIGHT. HOW MANY CHILDREN DO YOU HAVE?

24 A THREE.

25 Q OKAY. AND THEY ARE ALL GROWN AND GONE; IS THAT RIGHT?

1 A YES.

2 Q AND YOU GOT SOME GRANDCHILDREN?

3 A YES.

4 Q OKAY. RICK, YOU ARE -- YOU GO BY RICK?

5 A THAT'S TRUE.

6 Q I KNOW YOU AS RICK.

7 A YES.

8 Q IS IT ALL RIGHT FOR ME TO CALL YOU--

9 A ABSOLUTELY.

10 Q OKAY. YOU ARE CURRENTLY RETIRED; IS THAT CORRECT?

11 A THAT IS CORRECT.

12 Q AND YOU MEDICALLY RETIRED FROM THE DORN VA FAIRLY
13 RECENTLY?

14 A I DON'T -- I -- TERM MEDICALLY RETIRED IS NOT VERY
15 PRECISE. I -- I HAD INTENDED TO RETIRE IN SEPTEMBER OF 2018,
16 IN OTHER WORDS THIS YEAR, BUT FOR THE LAST FEW YEARS I HAVE
17 BEEN HAVING A LOT OF BACK PROBLEMS. AND DURING MY -- DURING
18 2017 THOSE PROBLEMS WERE PROGRESSING TO THE POINT THAT I
19 REALIZED I WAS GOING TO PROBABLY HAVE TO MOVE MY RETIREMENT
20 DATE UP.

21 SO I ENDED UP -- ALTHOUGH I HAD PLANNED TO RETIRE IN
22 SEPTEMBER OF 2018, I MOVED MY PLANS UP DUE TO PHYSICAL
23 PROBLEMS WITH BEING ABLE TO REALLY PERFORM MY JOB IN
24 SEPTEMBER. SO I RETIRED ON SEPTEMBER 30TH OF 2017. IT WAS
25 JUST A PURE RETIREMENT A -- FROM THE VA STANDPOINT IT WAS NOT

1 A MEDICAL RETIREMENT, IT WAS JUST RETIREMENT. BUT I WAS NOT
2 ABLE TO PERFORM MY -- FULLY PERFORM MY DUTIES, SO I DID
3 QUALIFY FOR DISABILITY BENEFITS UNDER A PRIVATE POLICY I
4 HAVE.

5 Q ALL RIGHT, SIR. AND SO, YOU RETIRED FROM THE POSITION
6 OF A STAFF ANESTHESIOLOGIST AT THE DORN VA MEDICAL CENTER ON
7 SEPTEMBER THE 30TH OF 2017.

8 A THAT'S CORRECT.

9 Q HOW LONG HAD YOU BEEN EMPLOYED AT THE DORN VA AT THE
10 TIME OF YOUR RETIREMENT?

11 A NINETEEN YEARS.

12 Q AND THROUGHOUT THAT 19 YEARS DID YOU SERVE CONTINUOUSLY
13 AS A STAFF ANESTHESIOLOGIST?

14 A NO.

15 Q ALL RIGHT. TAKE US THROUGH YOUR EMPLOYMENT AT DORN VA
16 AND TELL US WHAT POSITIONS YOU HELD.

17 A PRIOR TO -- WELL, I HAD WORKED AT THE DORN IN MEDICAL
18 SCHOOL AND I DID MY RESIDENCY AT RICHLAND MEMORIAL, SO I HAD
19 WORKED AT DORN AS A MEDICAL STUDENT AND I HAD WORKED AT DORN
20 AS A ANESTHESIA RESIDENT AND INTERNAL MEDICINE RESIDENT,
21 WHICH IS MY TRANSITION YEAR PRIOR TO ANESTHESIOLOGY.

22 AFTER I FINISHED RESIDENCY I TOOK A POSITION IN
23 ORANGEBURG, SOUTH CAROLINA, AND WAS LOOKING FOR OPPORTUNITIES
24 TO COME BACK TO COLUMBIA. AND THE FIRST OPPORTUNITY THAT
25 PRESENTED ITSELF WAS THE VA HOSPITAL BECAUSE THEY HAD MADE

1 THE DECISION TO TRANSITION AWAY FROM HAVING ANESTHESIA
2 SERVICES PROVIDED UNDER A CONTRACT.

3 FOR MANY YEARS AND DURING THE TIME I WAS IN MEDICAL
4 TRAINING ANESTHESIA SERVICES AT THE DORN VA WERE PROVIDED BY
5 ANESTHESIOLOGY CONSULTANTS OF COLUMBIA UNDER A CONTRACT.
6 THIS IS THE SAME GROUP THAT I WORKED FOR AS A RESIDENT WHICH
7 PROVIDED ANESTHESIA SERVICES AT RICHLAND MEMORIAL WHICH WAS
8 HOW IT WAS KNOWN AT THE TIME.

9 DORN AND ACC, ANESTHESIOLOGY CONSULTANTS OF COLUMBIA
10 DURING THE LATTER PART OF THE 1990'S WERE BASICALLY FAILING
11 TO NEGOTIATE THEIR CONTINUED RELATIONSHIP AND ULTIMATELY THE
12 DORN VA DECIDED THAT IT WOULD NO LONGER HAVE ITS ANESTHESIA
13 SERVICES PROVIDED UNDER A CONTRACT BUT THAT IT WOULD HAVE --
14 IT WOULD HIRE EMPLOYEES, WHAT THEY REFER TO AS FTE'S OR
15 FULL-TIME EQUIVALENTS.

16 AND I MADE INQUIRY AFTER SEEING AN ADVERTISEMENT IN A
17 PROFESSIONAL JOURNAL AND FOUND OUT THAT ONE OF MY GOOD
18 FRIENDS WHO HAD BEEN MY ATTENDING OVER AT RICHLAND MEMORIAL,
19 A FELLOW NAMED CURTIS BASINGER, WAS ALSO INTERESTED IN
20 LEAVING THE PRIVATE GROUP AND -- BECAUSE IT WAS VERY HIGH
21 PRESSURE -- AND HE WAS INTERESTED IN GOING TO THE VA ALSO.
22 SO WE MADE CONTACT WITH EACH OTHER. AND BASICALLY IN THE
23 SUMMER OF 1998 WE JOINTLY APPLIED TO BE THE TWO STAFF
24 ANESTHESIOLOGISTS AT DORN.

25 Q ALL RIGHT. AND YOU WERE HIRED AT THAT TIME?

1 A I WAS.

2 Q OKAY. AND YOU MENTIONED THAT FOR SOME PERIOD PRIOR TO
3 THAT YOU WERE IN PRIVATE PRACTICE IN ANESTHESIOLOGY IN
4 ORANGEBURG; IS THAT RIGHT?

5 A YES.

6 Q HOW LONG DID YOU DO THAT BEFORE YOU CAME TO DORN AS A
7 STAFF ANESTHESIOLOGIST?

8 A APPROXIMATELY THREE YEARS.

9 Q OKAY. ALL RIGHT. NOW, AND SO YOU SAID THAT YOU RETIRED
10 IN -- ON SEPTEMBER 30, 2017 AND YOU CAME TO DORN IN THE
11 SUMMER OF 1998 AS A STAFF ANESTHESIOLOGIST, AND SO THAT WOULD
12 BE YOUR 19 YEARS OF --

13 A YES.

14 Q -- VHA EXPERIENCE AS AN ANESTHESIOLOGIST ON THE PAYROLL
15 AT DORN.

16 A YES, SIR.

17 Q OKAY. LET ME GO BACK AND ASK YOU BRIEFLY TO TAKE US
18 THROUGH YOUR POST-HIGH SCHOOL EDUCATION.

19 A YES. AFTER I FINISHED HIGH SCHOOL I ENROLLED IN THE
20 UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL WITH THE INTENT
21 OF STUDYING MEDICINE. AND WHEN I ARRIVED THERE AND STARTED
22 MY FRESHMAN CURRICULUM I DECIDED THAT THE BEST MAJOR FOR ME
23 FOR PRE-MED WAS CHEMISTRY, AND SO I BEGAN MY PURSUIT OF A
24 BACHELOR OF SCIENCE IN CHEMISTRY AND CONTINUED TO DO SO UP
25 UNTIL THE FALL OF MY JUNIOR YEAR WHEN I WAS VERY SEVERELY

1 INJURED IN A FIRE AND I SPENT ABOUT THREE MONTHS AT NORTH
2 CAROLINA MEMORIAL HOSPITAL IN CHAPEL HILL, MOST OF THE TIME
3 IN INTENSIVE CARE AND A CONVALESCENT HOME AND WAS ABLE TO
4 RETURN TO CHAPEL HILL IN THE SUMMER OF 1972.

5 AND AT THAT TIME I CONSULT -- I WAS REALLY NOT
6 PHYSICALLY ABLE OR MENTALLY ABLE TO CONTINUE TO PURSUE MY
7 PRE-MEDICAL PLANS, AND SO I DECIDED I WOULD RETHINK MY CAREER
8 PLANS. AND I WANTED TO GRADUATE BASICALLY WITH MY CLASS AND
9 SO I FOUND A MAJOR THAT I WOULD BE ABLE TO DO ALL THE COURSE
10 REQUIREMENTS STARTING FROM SCRATCH IN ONE YEAR, AND THAT
11 MAJOR WAS POLITICAL SCIENCE.

12 Q AND THAT ENABLED YOU TO CATCH UP WITH YOUR CLASS.

13 A YES.

14 Q OKAY. AND SO DID YOU PURSUE THEN THAT MAJOR IN
15 POLITICAL SCIENCE RATHER THAN THE MAJOR IN CHEMISTRY AND
16 EVENTUALLY GRADUATE FROM UNC AT CHAPEL HILL?

17 A YES. I GRADUATED IN JULY AFTER THE FIRST SUMMER SESSION
18 AFTER THE NORMAL GRADUATION TIME. I GRADUATED IN JULY OF
19 1973 PHI BETA KAPPA WITH A BACHELOR OF ARTS IN POLITICAL
20 SCIENCE.

21 Q OKAY. AND WHAT DID YOU DO NEXT IN TERMS OF YOUR
22 EDUCATION?

23 A WELL, I GAVE A LOT OF THOUGHT TO WHAT I WAS GOING TO DO
24 CAREER-WISE BECAUSE I REALLY CHANGED GEARS SO MUCH. AND MY
25 FATHER WAS AN ATTORNEY AND I THOUGHT, WELL, I DIDN'T REALLY

1 HAVE ANY IDEAS OF WHERE I MIGHT GO IN THE BUSINESS COMMUNITY.
2 I DIDN'T KNOW -- AS MANY COLLEGE STUDENTS -- KNOW WHAT THEY
3 ARE GOING TO DO WITH THEIR LIFE, AND SO I MADE A DECISION
4 THAT I WOULD GO TO LAW SCHOOL AND THAT THAT WOULD GIVE ME
5 FLEXIBILITY.

6 I COULD EITHER USE THE TRAINING FROM LAW IN SOME TYPE OF
7 BUSINESS PURSUIT OR I COULD PRACTICE LAW. AND SO I DECIDED
8 TO GO TO LAW SCHOOL AND WAS ACCEPTED AT THE UNIVERSITY OF
9 SOUTH CAROLINA SCHOOL OF LAW AND STARTED THERE IN AUGUST,
10 SEPTEMBER OF 1973.

11 Q OKAY. AND DID YOU COMPLETE LAW SCHOOL AT USC?

12 A YES. I RECEIVED A JD MAGNA CUME LAUDE IN MAY OF '76.

13 Q OKAY. WHILE YOU WERE IN LAW SCHOOL DID YOU CLERK FOR
14 ANY FIRMS OR GROUPS OR GOVERNMENT AGENCIES?

15 A AFTER MY FIRST YEAR OF LAW SCHOOL I CLERKED FOR MY
16 FATHER'S FIRM. AND AFTER MY SECOND YEAR OF LAW SCHOOL I
17 CLERKED FOR THE UNITED STATES ATTORNEY IN SOUTH CAROLINA WHO
18 WAS THEN MARK BUYCK.

19 Q OKAY. ALL RIGHT. AND YOU COMPLETED LAW SCHOOL AND YOUR
20 GRADUATION DATE AGAIN WAS WHAT?

21 A MAY OF 1976.

22 Q ALL RIGHT. AND AT THAT TIME DID YOU KNOW WHAT YOU
23 WANTED TO DO IN THE LAW?

24 A MY FATHER -- I HAD -- LAW SCHOOL PRETTY MUCH PUSHED ME
25 TOWARD PRACTICING LAW, AND SO I DECIDED TO DO THAT.

1 Q OKAY.

2 A AND MY FATHER HAD ADVISED ME EARLY ON THAT HE THOUGHT IT
3 WAS VERY GOOD EXPERIENCE TO BE A LAW CLERK FOR A FEDERAL
4 JUDGE.

5 Q OKAY. DID YOU PURSUE THAT?

6 A I DID.

7 Q ALL RIGHT. AND DID YOU GO TO WORK FOR A JUDGE?

8 A I DID. JUDGE ROBERT CHAPMAN HAD -- HE WAS ENTITLED TO
9 HAVE ONE LAW CLERK AND A BAILIFF. AND RATHER THAN HIRING A
10 BAILIFF, HE HIRED TWO LAW CLERKS. AND ONE OF HIS LAW CLERKS
11 WOULD DRIVE HIM AS THE BAILIFF NORMALLY WOULD AND CRY COURT.
12 AND I WAS HIRED AS THE LAW CLERK WHO WOULD DRIVE THE JUDGE
13 AND CRY COURT FOR TWO-YEAR PERIOD FROM 19 -- TO BE FROM 1976
14 TO 1978, AND I WOULD LIVE IN CAMDEN WHERE HE LIVED SO I COULD
15 DRIVE HIM TO AND FROM THE COURTHOUSES IN EITHER FLORENCE OR
16 GREENVILLE OR COLUMBIA, WHEREVER HE WAS HOLDING COURT.

17 Q NOW AS A RESULT OF THAT EXPERIENCE WITH JUDGE CHAPMAN,
18 HOW -- WHAT DID YOU DECIDE TO GO INTO LAW?

19 A I DECIDED TO GO WORK FOR MY FATHER'S FIRM, KENNEDY AND
20 PRICE.

21 Q AND THAT WAS HERE IN COLUMBIA?

22 A YES.

23 Q ALL RIGHT. HOW LONG DID YOU PRACTICE LAW WITH KENNEDY
24 AND PRICE?

25 A NINE YEARS.

1 Q OKAY. AND DURING THAT PERIOD OF NINE YEARS PRACTICING
2 LAW, DID YOU EVER THINK ABOUT YOUR ORIGINAL DESIRE TO PURSUE
3 MEDICINE AS A CAREER?

4 A THE LONGER I PRACTICED, THE MORE UNHAPPY I BECAME
5 PRACTICING LAW AND IT -- DIDN'T REALLY KNOW WHAT TO DO ABOUT
6 IT. AND I HAD -- I HAD THIS SORT OF NAGGING DOUBT OR I GUESS
7 REGRET, NAGGING REGRET THAT I HADN'T FOLLOWED THROUGH WITH MY
8 INITIAL CAREER GOALS. AND BASICALLY ONE DAY ABOUT 19 -- I'D
9 SAY 1985 I BASICALLY HAD AN EPIPHANY THAT I COULD STILL DO
10 IT. THERE WAS A MEDICAL SCHOOL IN COLUMBIA AND IT WAS
11 POSSIBLE AND I -- SO I STARTED LOOKING INTO IT.

12 Q NOW, AT THAT TIME YOU WOULD HAVE BEEN IN YOUR 30'S; IS
13 THAT RIGHT?

14 A YES.

15 Q OKAY. AND YOU WERE MARRIED?

16 A YES.

17 Q YOU AND KATHY WERE MARRIED?

18 A YES.

19 Q DID YOU HAVE ANY CHILDREN AT THAT TIME?

20 A WE HAD TWO CHILDREN AND WE HAD A THIRD CHILD BORN ON MY
21 THIRD DAY OF MEDICAL SCHOOL.

22 Q OKAY. YOU WERE PRESENTED THEN WITH A SITUATION WHERE
23 YOU NEEDED TO EARN ENOUGH MONEY TO FEED YOUR CHILDREN AND
24 YOUR -- WAS YOUR WIFE WORKING AT THAT TIME?

25 A YES.

1 Q ALL RIGHT. AND SO, WHAT DID -- JUST TELL US WHAT THAT
2 THOUGHT PROCESS WAS AND WHAT YOU ENDED UP DOING.

3 A WELL, MY FAMILY WAS VERY IMPORTANT AND I DID NOT WANT TO
4 MOVE MY FAMILY OUT OF COLUMBIA. HAD I NOT BEEN ACCEPTED AT
5 THE UNIVERSITY OF SOUTH CAROLINA SCHOOL OF MEDICINE, I WOULD
6 NOT HAVE PURSUED IT. MY WIFE HAD RECENTLY BEEN ELECTED AS
7 RICHLAND COUNTY PROBATE JUDGE. THAT HELPED US SOMEWHAT
8 FINANCIALLY. AND I -- WE CRUNCHED THE NUMBERS AND IT WAS
9 POSSIBLE FOR ME TO PERCEIVE THIS GOAL.

10 Q NOW HOW DID YOU DO THAT, RICK, WHEN YOU HAD A DEGREE IN
11 POLITICAL SCIENCE?

12 A I HAD SOME OF THE COURSEWORK COMPLETED DURING THE FIRST
13 TWO YEARS OF COLLEGE. I HAD COMPLETED ALL OF MY INORGANIC
14 CHEMISTRY REQUIREMENTS AND I HAD COMPLETED MY REQUIREMENTS IN
15 PHYSICS AND I COMPLETED SOME OF THE ORGANIC CHEMISTRY
16 REQUIREMENTS.

17 SO I WENT AND VISITED WITH ROBERT SABALIS WHO WAS THE
18 DEAN OF ADMISSION AT THE MEDICAL SCHOOL AND BASICALLY WORKED
19 OUT WHAT I WOULD NEED TO DO. I NEEDED TO PICK UP THREE
20 SCIENCE COURSES, ONE ORGANIC CHEMISTRY COURSE AND TWO BIOLOGY
21 COURSES THAT I WOULD TAKE AT NIGHT AT THE UNDERGRADUATE
22 SCHOOL AT THE UNIVERSITY OF SOUTH CAROLINA. THE OTHER THING
23 I NEEDED TO DO WAS TO MAKE A SATISFACTORY SHOWING ON THE
24 ADMISSION TEST FOR MEDICAL SCHOOL WHICH IS CALLED MCAT.

25 Q OKAY. WERE YOU ABLE TO ACCOMPLISH BOTH OF THOSE; THAT

1 ARE IS UNDERGRADUATE COURSES AND THE SCIENCES AND THEN THE
2 SUCCESSFUL MCAT SCORE?

3 A YES, I WAS.

4 Q ALL RIGHT. AND AS A RESULT OF THAT, DID YOU GET INTO OR
5 WERE YOU ACCEPTED INTO USC SCHOOL OF MEDICINE?

6 A I WAS ACCEPTED IN THE SCHOOL OF MEDICINE.

7 Q AND WHAT YEAR WAS THAT, RICK?

8 A 1987.

9 Q OKAY. AND HOW LONG DID IT TAKE YOU TO COMPLETE MEDICAL
10 SCHOOL?

11 A FOUR YEARS.

12 Q ALL RIGHT. AND SO YOU WOULD HAVE FINISHED MEDICAL
13 SCHOOL THEN ROUGHLY 1991?

14 A THAT'S CORRECT.

15 Q DOES THAT SOUND ABOUT RIGHT? OKAY. AND TAKE US FROM
16 THERE AND GO FORWARD AND TELL US WHAT YOU DID IN THE FIELD OF
17 MEDICINE.

18 A I WAS REALLY MORE INTERESTED IN A SPECIALTY OTHER THAN
19 PRIMARY CARE. I HAD -- AFTER PRACTICING LAW, I REALIZED THAT
20 THERE WAS SO MUCH OF MY TIME THAT WAS SPENT NOT PRACTICING
21 LAW BUT RUNNING THE LAW FIRM AS A BUSINESS, HIRING AND FIRING
22 EMPLOYEES, AND SUPPLIES, AND JUST THE NORMAL THINGS OF
23 RUNNING AN OFFICE.

24 AND I REALIZED THAT A LOT OF PRIMARY CARE MEDICAL
25 PRACTICE WAS -- HAD A LOT OF THAT KIND OF TIME THAT WAS SPENT

1 AWAY FROM ACTUAL PRACTICE OF MEDICINE, SO I STARTED LOOKING
2 INTO ANESTHESIOLOGY WHICH IS HOSPITAL-BASED SPECIALTY.
3 THERE'S NO OFFICE TO MAINTAIN, VERY MINIMAL OVERHEAD, AND AN
4 OVERWHELMING AMOUNT OF THE TIME IS SPENT ACTUALLY PURSUING
5 YOUR CAREER.

6 AND SO I DECIDED THAT I WOULD SEEK TO MATCH -- WHICH IS
7 THE WAY WE CALL IT -- THEY DO A MATCH. YOU DON'T ACTUALLY
8 APPLY TO A RESIDENCY PROGRAM AND GET ACCEPTED. YOU PUT YOUR
9 NAME IN A BOX AFTER -- AND YOU INTERVIEW WITH A NUMBER OF
10 DIFFERENT RESIDENCY PROGRAMS AND THEN THEY HAVE MATCH DAY
11 WHERE THEY OPEN UP THE ENVELOPES AND YOU FIND WHERE YOU'RE
12 GOING.

13 Q AND DID YOU FIND WHERE YOU WERE GOING?

14 A YES. I WENT TO RICHLAND MEMORIAL.

15 Q OKAY. AND HOW LONG DID -- AND THAT WOULD HAVE BEEN FOR
16 AN ANESTHESIOLOGY RESIDENCY?

17 A I MATCHED IN WHAT WAS CALLED SOME KIND OF -- IT WAS SORT
18 OF A COMPOSITE PROGRAM BECAUSE NO ONE RIGHT OUT OF MEDICAL
19 SCHOOL GOES DIRECTLY INTO ANESTHESIA TRAINING. THE
20 ANESTHESIA PROGRAM REQUIRES THAT YOU COMPLETE ONE YEAR OF
21 SORT OF AN INTERNSHIP IN SOME OTHER SPECIALTY. IT CAN BE ANY
22 NUMBER OF THINGS FROM INTERNAL MEDICINE TO PEDIATRICS,
23 SURGERY, FAMILY MEDICINE; A LOT OF DIFFERENT THINGS LIKE
24 THAT.

25 AND I MATCHED INTO A PROGRAM THAT PLACED ME AS AN

1 INTERNAL MEDICINE RESIDENT WITH RICHLAND MEMORIAL FOR THE ONE
2 YEAR AND THEN I ALREADY HAD MATCHED FOR THE ANESTHESIA
3 PROGRAM -- CALLED IT CLINICAL ANESTHESIA YEARS -- FOR THE
4 NEXT THREE YEARS AT RICHLAND MEMORIAL.

5 Q OKAY. AND DID YOU SUCCESSFULLY COMPLETE THAT TRAINING
6 BOTH IN THE INTERNAL MEDICINE YEAR AND THEN THE YEARS IN
7 ANESTHESIOLOGY RESIDENCY?

8 A YES.

9 Q ALL RIGHT. AND I BELIEVE YOU HAVE INDICATE -- WELL, LET
10 ME BACK UP A STEP. AND UNDERSTAND THERE'S SOMETHING CALLED
11 BOARD CERTIFICATION. DOES THAT RING A BELL?

12 A YES.

13 Q OKAY. AND WAS THAT SOMETHING THAT FOLLOWED AFTER YOU
14 COMPLETED YOUR RESIDENCY IN ANESTHESIOLOGY AT RICHLAND
15 MEMORIAL?

16 A YES. AFTER COMPLETION OF MY RESIDENCY, I TOOK THE
17 WRITTEN BOARDS AND PASSED THEM ON THE FIRST ATTEMPT.

18 Q OKAY.

19 A AND THEN THE FACT THAT I PASSED MY WRITTEN BOARDS MADE
20 ME ELIGIBLE TO TAKE THE ORAL BOARDS, AND SO THEN I WENT AND
21 TOOK MY ORAL BOARDS AND I PASSED THOSE ON FIRST ATTEMPT AND
22 RECEIVED BOARD CERTIFICATION IN I THINK IT WAS OCTOBER OF --
23 IT WAS OCTOBER OF THE FOLLOWING YEAR. IT WAS OCTOBER OF '96
24 WHEN I GOT BOARD CERTIFICATION.

25 Q OKAY. NOW, AT THAT TIME HAD YOU ALREADY GONE TO WORK IN

1 ORANGEBURG?

2 A YES, I WENT TO -- STARTED WORK IN ORANGEBURG I GUESS IT
3 WOULD HAVE BEEN IN THE SUMMER OF 1995 RIGHT AFTER I FINISHED
4 MY RESIDENCY.

5 Q OKAY. AND THAT WAS IN THE PRIVATE PRACTICE OF MEDICINE
6 SPECIFICALLY IN ANESTHESIOLOGY?

7 A THAT'S CORRECT.

8 Q AND YOU WORKED THERE AT THE HOSPITAL IN ORANGEBURG
9 DURING THAT TIME; IS THAT RIGHT?

10 A YES.

11 Q AND I BELIEVE YOU SAID THAT WAS ABOUT TWO YEARS THAT YOU
12 DID THAT?

13 A THREE YEARS.

14 Q THREE YEARS. EXCUSE ME. ALL RIGHT. AND AT THE END OF
15 THAT THREE YEARS WHAT DID YOU DO?

16 A DURING THE TIME I WAS IN ORANGEBURG, I WAS CONTINUALLY
17 WATCHING FOR OPENINGS IN THE COLUMBIA MARKET BECAUSE I DID
18 NOT MOVE MY FAMILY TO ORANGEBURG. MY WIFE WAS STILL A
19 RICHLAND COUNTY PROBATE JUDGE. MY CHILDREN WERE IN SCHOOL IN
20 COLUMBIA SCHOOLS. AND I WAS ESSENTIALLY COMMUTING TO
21 ORANGEBURG TO PRACTICE AND I HAD A SMALL HOUSE IN ORANGEBURG
22 BECAUSE I NEEDED TO BE THERE WHEN I WAS ON CALL.

23 Q YOU MEAN AT NIGHT?

24 A YEAH, ON CERTAIN WEEKENDS. SO WHENEVER I WAS ON CALL, I
25 HAD TO BE WITHIN A CLOSE DISTANCE TO THE HOSPITAL. SO I

1 WAS -- DURING THE ENTIRE TIME I WAS IN ORANGEBURG, I WAS
2 ALWAYS KEEPING MY EYE OPEN FOR OPPORTUNITIES. AND AS I
3 MENTIONED TO YOU EARLIER, WHEN I SAW THE NOTICE IN THE
4 PROFESSIONAL JOURNAL ABOUT THE VA LOOKING TO HIRE STAFF
5 ANESTHESIOLOGISTS, I PURSUED THAT.

6 Q AND THAT WOULD HAVE BEEN -- THAT WOULD HAVE BROUGHT YOU
7 BACK TO COLUMBIA WHERE KATHY WAS WORKING AND TRYING TO RAISE
8 THREE CHILDREN.

9 A YES.

10 Q ALL RIGHT. AND SO YOU APPLIED AT THE VA AND YOU
11 INDICATED THAT YOU WITH DR. BASINGER MADE APPLICATION AND YOU
12 WERE ACCEPTED AND YOU WENT TO WORK THERE IN THE SUMMER OF
13 1998; IS THAT RIGHT?

14 A YES. DR. BASINGER AND I HAD A CONVERSATION AND HE SAID,
15 NOW, SOMEBODY HAS TO BE -- SIT THE QUOTE CHIEF. AND HE SAID,
16 DO YOU HAVE ANY OBJECTION TO ME BEING THE CHIEF? AND I SAID
17 ABSOLUTELY NOT. HE WAS AN ANESTHESIOLOGIST WITH MANY YEARS
18 OF EXPERIENCE AND QUITE PROMINENT IN THE AREA AND WAS A GOOD
19 BUDDY OF MINE AND THAT -- I WAS VERY HAPPY FOR HIM TO HAVE
20 THE ROLE OF CHIEF.

21 Q OKAY. SO YOU WENT IN IN THE SUMMER OF '98 AND HE WAS
22 THE CHIEF OF THE SECTION OF ANESTHESIOLOGY.

23 A YES.

24 Q AND YOU WOULD HAVE BEEN A STAFF ANESTHESIOLOGIST; IS
25 THAT RIGHT?

1 A YES. WE WERE UNDER THE SURGERY SERVICE LINE AT THAT
2 TIME AND FOR MANY YEARS AFTER THAT.

3 Q OKAY. BUT IT WAS JUST THE TWO OF YOU THERE ON STAFF AS
4 ANESTHESIOLOGISTS WHEN YOU STARTED IN '98; IS THAT RIGHT?

5 A YES.

6 Q AND THAT LASTED FOR SOME PERIOD OF TIME.

7 A JUST THE TWO OF US WERE THERE?

8 Q YES, SIR.

9 A YES, IT WAS ABOUT FIVE OR SIX YEARS LATER DR. BASINGER
10 LEFT THE VA TO GO TO NASHVILLE AND THAT LEFT ME AS THE ONLY
11 ANESTHESIOLOGIST AT THE VA.

12 Q NOW, HOW WERE YOU GOING TO DO THAT; THAT IS BE THE ONLY
13 ANESTHESIOLOGIST IN A MEDICAL FACILITY THAT WE HAVE HEARD
14 BEING DESCRIBED WITH ALL THESE OPERATING ROOMS AND YOU'RE THE
15 ONLY ANESTHESIOLOGIST?

16 A WELL, IT WASN'T EASY. I STILL HAD A LOT OF CONTACTS AT
17 RICHLAND MEMORIAL. THERE WERE A NUMBER OF ANESTHESIOLOGISTS
18 AT RICHLAND MEMORIAL WHO HAD ENJOYED WORKING AT THE VA WHEN
19 THEY WORKED THERE UNDER THE CONTRACT. AND I WAS ABLE TO
20 RECRUIT SOME OF THESE PEOPLE TO COME DO SORT OF A MOONLIGHT
21 BASIS THAT WHEN THEY HAD A DAY OFF AT RICHLAND, THEY WOULD
22 COME WORK FOR THE VA AND THE VA WOULD PAY THEM A CERTAIN
23 AMOUNT PER DAY FOR A ONE-DAY CONTRACT BASIS AND THEY AGREED
24 TO HELP WITH CALL.

25 AND THERE WAS FORTUITOUSLY AN OLDER GENTLEMAN WHO WAS A

1 RETIRED VA PHYSICIAN FROM SOMEWHERE ELSE -- I THINK OHIO, I'M
2 NOT SURE -- HIS NAME WAS DON BENSON. HE HAD JUST
3 FORTUITOUSLY GOTTEN IN CONTACT WITH ME BECAUSE BASICALLY I
4 WAS THE CHIEF BY DEFAULT. I WAS THE ONLY ANESTHESIOLOGIST
5 THERE.

6 AND SO I DEALT WITH RECRUITING HELPERS AND I RECRUITED
7 THIS DR. BENSON TO COME HELP US. AND HE WOULD FLY IN, STAY
8 ALL WEEK, HE WOULD TAKE CALL, AND HE CONTINUED TO DO THAT
9 ALMOST EVERY WEEK FOR SOME TIME. AND SO BETWEEN USING DR.
10 BENSON AND THE FREELANCE PEOPLE I HAD FROM RICHLAND, I WAS
11 ABLE TO KEEP THE OR RUNNING.

12 Q DID THERE COME A POINT IN TIME, RICK, WHEN THE VA, THE
13 DORN VA BEGAN TO HIRE OTHER FULL-TIME STAFF ANESTHESIOLOGISTS
14 TO REPLACE DR. BASINGER AND TO GROW?

15 A YES. EVEN BEFORE DR. BASINGER LEFT WE WERE RATHER
16 SHORT-STAFFED AND THERE WAS A CONTINUING DISCUSSION OF TRYING
17 TO GET THE ADMINISTRATION TO APPROVE US HIRING ADDITIONAL
18 PEOPLE. AND THEN IT GOT QUITE CRITICAL WHEN DR. BASINGER
19 LEFT, AND SO I HAD CONTINUING DISCUSSIONS WITH ADMINISTRATION
20 TO GET APPROVAL FOR US TO ADVERTISE FOR AND HIRE ADDITIONAL
21 ANESTHESIOLOGISTS.

22 Q OKAY.

23 A AND I CAN START GOING THROUGH THAT PROCESS OF WHO I
24 HIRED IF...

25 Q WELL, LET'S DO THIS. YOU HEARD DR. MILLER TESTIFY THAT

1 WHEN HE CAME TO THE DORN VA THAT YOU WERE AT THAT TIME THE
2 ACTING CHIEF. IS THAT CORRECT? WERE YOU--

3 A WELL, I WAS THE CHIEF.

4 Q YOU WERE THE CHIEF.

5 A I WAS -- IT WASN'T ACTING. I -- I NEVER WAS OFFICIALLY
6 APPOINTED, BUT I WAS CONSIDERED BY EVERYONE IN THE
7 ADMINISTRATION THE SECTION CHIEF AND WENT TO THE MEETINGS AND
8 DID ALL THE FUNCTIONS OF A SECTION CHIEF. I WAS INVOLVED
9 WITH ALL THE RECRUITMENT EFFORTS, SO I WAS -- I WAS CHIEF OF
10 THE SECTION DURING THAT PERIOD OF TIME.

11 Q ALL RIGHT, SIR. AND AT SOME POINT LATER YOU STEPPED
12 DOWN AS CHIEF AND YOU CONTINUED ON AS A STAFF
13 ANESTHESIOLOGIST; IS THAT CORRECT?

14 A I WOULDN'T SAY I STEPPED DOWN. I WAS REMOVED.

15 Q ALL RIGHT. AND WHAT WAS THAT ALL ABOUT, RICK?

16 A DURING 2005 THERE WERE SOME SERIOUS MISCONDUCT FROM THE
17 DEPARTMENT OF GENERAL SURGERY. I HAD FOUND THAT--

18 MRS. BAILEY: YOUR HONOR, I OBJECT ON THE RELEVANCE
19 OF THIS. THIS IS A PAY DISPARITY CASE.

20 MR. IRVIN: YOUR HONOR, THAT'S FINE. AND I
21 UNDERSTAND MRS. BAILEY'S OBJECTION. AND AS LONG AS SHE'S NOT
22 GOING TO GO INTO THAT IN HER CROSS-EXAMINATION, WE CAN SKIP
23 ON BY THAT, RICK.

24 THE COURT: THAT'S FINE.

25 BY MR. IRVIN:

1 Q AND THEN JUST LET ME ASK YOU THAT AT SOME POINT THEN
2 YOU -- YOU TRANSFERRED OR TRANSITIONED FROM BEING THE CHIEF
3 OF THE ANESTHESIOLOGY SECTION TO A STAFF ANESTHESIOLOGIST; IS
4 THAT CORRECT?

5 A JUST KIND OF MAKE IT CLEAR THAT I WAS REMOVED AS --
6 BECAUSE I WAS A WHISTLEBLOWER WITHOUT GETTING INTO DETAILS.

7 Q OKAY. AND YOU BECAME A STAFF ANESTHESIOLOGIST.

8 A YES.

9 Q ALL RIGHT. AND YOU CONTINUED IN THAT CAPACITY AND IN
10 THAT POSITION UNTIL, AS YOU HAVE TOLD US, YOU RETIRED ON
11 SEPTEMBER THE 30TH OF 2017; IS THAT CORRECT?

12 A THAT IS CORRECT.

13 Q OKAY. NOW DR. KENNEDY, YOU HAVE BEEN WITH US HERE THESE
14 LAST TWO DAYS AND YOU HAVE BEEN ABLE TO HEAR A LOT OF THE
15 TESTIMONY AND SO FORTH. AND WE HAVE FOCUSED ON THESE
16 COMPENSATION PANEL REVIEWS THAT WERE DONE WITH THE
17 ANESTHESIOLOGY GROUP -- THAT IS THE STAFF ANESTHESIOLOGISTS
18 THAT CONSISTED OF YOURSELF, DR. ALGHOTHANI, DR. NGUYEN, DR.
19 PENDER AND DR. PRYOR; IS THAT CORRECT?

20 A YES.

21 Q OKAY. NOW, HERE IS WHAT I'D LIKE FOR YOU TO DO NOW FOR
22 US. I'M GOING TO -- I'M GOING TO SHOW YOU EXHIBIT NUMBER 10
23 THAT IS IN EVIDENCE. AND WE CAN I BELIEVE JUST USE THIS TO
24 HELP US THROUGH A LITTLE OF YOUR TESTIMONY. AND THESE ARE
25 THE TYPED-UP SHEETS FOR THE FIVE OF YOU WHO WERE STAFF

1 ANESTHESIOLOGISTS AND THE TESTIMONY HAS BEEN THAT THOSE
2 SHEETS WOULD HAVE BEEN ATTACHED OR HAD BEEN A PART OF THIS
3 WHOLE COMPENSATION PANEL REVIEW PROCESS. JUST WANT YOU TO
4 HAVE THOSE IN FRONT OF YOU IN CASE YOU NEED TO LOOK AT THEM
5 OR YOU WANT TO LOOK AT THEM.

6 BUT HERE'S WHAT I'M GOING TO DO. I'M GOING TO TAKE THE
7 FACTORS THAT ARE SHOWN ON THE DEPARTMENT OF VETERAN'S AFFAIR
8 COMPENSATION PANEL FORMS ON PAGE ONE THAT THE TESTIMONY HAS
9 BEEN FROM MRS. DOTY AND OTHERS CORRELATES WITH THOSE TYPED-UP
10 SHEETS.

11 A YES.

12 Q YOU UNDERSTAND WHAT I'M TALKING ABOUT HERE?

13 A YES.

14 Q OKAY. AND AS I UNDERSTAND THE TESTIMONY -- AND HERE I'M
15 LOOKING AT PLAINTIFF'S EXHIBIT 11, SO LET ME JUST HAND YOU
16 PLAINTIFF'S EXHIBIT 11 SO YOU'LL HAVE IN FRONT OF YOU WHAT I
17 HAVE GOT IN FRONT OF ME. AND YOU WILL SEE, AS YOU KNOW, ON
18 PAGE ONE THERE ABOUT HALF-WAY DOWN THERE'S A BOX AND IT HAS
19 SEVEN FACTORS IN THE BOX. DO YOU -- YOU SEE THAT THERE?

20 A YES.

21 Q AND THEN ON THOSE SHEETS THAT I HAVE JUST HANDED YOU,
22 YOU HAVE WHAT WE UNDERSTAND TO BE THE TYPED-UP DESCRIPTIONS
23 THAT CORRELATE WITH THOSE FACTORS. YOU WITH ME?

24 A YES.

25 Q HERE'S WHAT I WANT YOU TO DO, DR. KENNEDY, FOR THE

1 COURT. LET'S START WITH -- I WANT YOU TO COMPARE YOURSELF
2 WITH THE OTHER STAFF ANESTHESIOLOGISTS PURSUANT TO THESE
3 FACTORS.

4 A OKAY.

5 Q OKAY.

6 MRS. BAILEY: OBJECTION, YOUR HONOR. THERE'S NO
7 FOUNDATION FOR HIM HAVING THE EXPERTISE TO COMPARE HIMSELF
8 WITH THESE SEVEN FACTORS OF THE OTHER ANESTHESIOLOGISTS. I
9 THINK SOMEBODY WHO IS AN HR REPRESENTATIVE COULD HAVE
10 COMPARED THESE FACTORS ON THE DIFFERENT PEOPLE, BUT HE HAS NO
11 EXPERTISE IN THAT AREA THAT I HEARD.

12 MR. IRVIN: YOUR HONOR, I'M JUST ASKING HIM TO
13 COMPARE FACTUALLY HIS UNDERSTANDING OF THESE. HE'S BEEN
14 THROUGH ALL THESE REVIEWS, HE'S SAT ON THE PANELS. IT
15 DOESN'T--

16 THE COURT: I AM NOT SURE WHAT YOU'RE ASKING. ARE
17 YOU ASKING HIM TO LOOK AT LIKE NUMBER ONE, LEVEL EXPERIENCE,
18 HE HAS 17, DR. ALGHOTHANI HAS--

19 MR. IRVIN: YES, MA'AM.

20 THE COURT: SO, I MEAN, YOU CAN READ FROM THE FORMS
21 AND SAY WHAT THEY ARE BUT HE CAN'T MAKE HIS OWN OPINION AS TO
22 WHETHER OR NOT HE'S MORE QUALIFIED OR LESS QUALIFIED THAN ANY
23 OF THE OTHER INDIVIDUALS.

24 BY MR. IRVIN:

25 Q OKAY. WELL, LET ME DO THIS THEN IF I CAN, AND I BELIEVE

1 THIS HAS ALREADY BEEN ESTABLISHED, BUT I WANT YOU TO TELL US.
2 WITH RESPECT TO FACTOR NUMBER SIX, THAT IS PRIOR VHA
3 EXPERIENCE, WOULD YOU PLEASE TAKE A LOOK AT THOSE SHEETS THAT
4 ARE IN EVIDENCE AND TELL US WHAT YOUR NUMBER OF YEARS IN
5 PRIOR VH EXPERIENCE IS ON YOUR SHEET.

6 A THIS SHEET SAYS NUMBER SIX, DR. KENNEDY HAS 20 YEARS VHA
7 EXPERIENCE.

8 Q ALL RIGHT. AND HOW DOES THAT COMPARE IN YEARS TO THE
9 OTHER DOCTORS?

10 A IT'S MORE THAN ANY OF THE OTHER DOCTORS.

11 Q ALL RIGHT, SIR. YOU ARE, OF COURSE, BOARD CERTIFIED.

12 A YES.

13 Q DR. KENNEDY, WHAT DO YOU CONSIDER TO BE YOUR
14 ACCOMPLISHMENTS IN THE FIELD OF ANESTHESIOLOGY?

15 A I HAVE BEEN QUITE ACTIVE IN ORGANIZED MEDICINE.

16 MRS. BAILEY: OBJECTION, YOUR HONOR. THAT'S GOING
17 BEYOND THE SCOPE OF THIS EXHIBIT.

18 MR. IRVIN: YOUR HONOR, I'M NOT ON AN EXHIBIT. I'M
19 JUST ASKING HIM WHAT HE CONSIDERS TO BE HIS ACCOMPLISHMENTS
20 IN THE FIELD OF ANESTHESIOLOGY.

21 THE COURT: THAT'S FINE. HE CAN SAY WHAT HE'S DONE
22 IN ANESTHESIOLOGY. YOU CAN ANSWER THE QUESTION.

23 THE WITNESS: I BEGAN ACTIVE IN THE STATE AND
24 NATIONAL ANESTHESIA SOCIETIES FROM THE TIME I WAS A RESIDENT.
25 I ATTENDED THE AMERICAN SOCIETY OF ANESTHESIOLOGISTS MEETING

1 AS A RESIDENT AND I ATTENDED MULTIPLE MEETINGS OF SOUTH
2 CAROLINA SOCIETY OF ANESTHESIOLOGY AS A RESIDENT.

3 I WAS INVOLVED BOTH IN ANESTHESIA AND IN THE LOCAL
4 MEDICAL SOCIETIES. I WORKED MY WAY UP THROUGH THE STATE
5 SOCIETY OF ANESTHESIA HOLDING MULTIPLE POSITIONS CULMINATING
6 IN BEING PRESIDENT OF THE SOUTH CAROLINA SOCIETY OF
7 ANESTHESIOLOGY. AND AROUND 2005 OR 2006, SUBSEQUENT TO THAT
8 TIME I HAVE SERVED AS A DELEGATE FROM SOUTH CAROLINA TO THE
9 CONVENTION OF THE AMERICAN SOCIETY OF ANESTHESIOLOGISTS ON A
10 NUMBER OF OCCASIONS.

11 I WAS ASKED TO SERVE TO REPRESENT ANESTHESIOLOGY ON A
12 TASK FORCE OF THE SOUTH CAROLINA MEDICAL ASSOCIATION LOOKING
13 AT OFFICE-BASED SURGERY PRACTICES. AND THE TASK FORCE THAT I
14 WAS ON WAS INSTRUMENTAL IN COMING UP WITH RULES FOR
15 OFFICE-BASED SURGERY TO IMPROVE SAFETY BECAUSE THERE HAD BEEN
16 A LOT OF BAD OUTCOMES IN OFFICE-BASED SURGERY SITUATIONS.
17 AND OUR TASK FORCE'S POLICIES WERE ULTIMATELY ADOPTED INTO
18 LAW BY THE REGULATORY AGENCIES IN SOUTH CAROLINA.

19 I WAS ALSO APPOINTED TO BE THE ANESTHESIA REPRESENTATIVE
20 TO THE CARRIER ADVISORY COMMITTEE, WHICH WE ABBREVIATED AS
21 THE CAC, AND I AM -- THE CAC IS THE COMMITTEE OF DIFFERENT
22 SPECIALISTS WHO CONSULT WITH THE MEDICARE CONTRACTOR,
23 PALMETTO GBA, TO DISCUSS RULES ON COMPENSATION, RULES ON
24 REIMBURSEMENT PRINCIPLES SO THAT THERE IS GOOD COMMUNICATION
25 BETWEEN THE MEDICARE CONTRACTOR THAT IS COMING UP WITH THESE

1 RULES AND THE VARIOUS SPECIALTIES. AND I HAVE SERVED AS A
2 MEMBER OF A CAC FROM THE ANESTHESIA SOCIETY UP UNTIL
3 RECENTLY.

4 I HAVE ALSO WRITTEN A NUMBER OF ARTICLES. I HAVE
5 GIVEN -- GIVEN TALKS DOWN IN HILTON HEAD ON -- TO ANESTHESIA
6 PAIN SOCIETIES ON MALPRACTICE IMPLICATION -- IMPLICATIONS OF
7 THEIR PRACTICE. I'VE GIVEN TALKS AT THE VA MOST RECENTLY ON
8 HOW TO HANDLE PERIOPERATIVE CARE OF PATIENTS WHO ARE ON
9 HIGH-DOSE NARCOTICS.

10 ON SEVERAL OCCASIONS I WAS ASKED TO BE A MODERATOR AT AN
11 ANESTHESIA CONFERENCE DOWN IN HILTON HEAD WHERE I WAS THE
12 MODERATOR OF NATION-WIDE SPEAKERS WHO CAME IN TO GIVE
13 LECTURES ON ANESTHESIA TOPICS.

14 Q OKAY. NOW, LET ME DIRECT YOUR ATTENTION TO EARLY 2014.
15 YOU HAVE HEARD DR. MILLER'S TESTIMONY. AND LET ME ASK YOU,
16 DID YOU HAVE OCCASION IN EARLY 2014 TO GO TO DR. MILLER, WHO
17 AT THAT TIME WAS THE ANESTHESIOLOGY SERVICE LINE CHIEF, TO
18 TALK ABOUT CONCERNS THAT YOU HAD?

19 A YES, I DID. IN THE EARLY PART OF 2014 I WAS CONCERNED
20 THAT MY SALARY HAD BEEN SOMEWHAT STAGNANT FOR A NUMBER OF
21 YEARS UP TO THAT POINT. I HAD BEEN DOING RETIREMENT PLANNING
22 AND SORT OF HAD THE REASONABLE EXPECTATIONS AS -- BY THE TIME
23 I GOT TO THE MAGIC THREE YEARS PRIOR TO RETIREMENT THAT MY
24 OVERALL SALARY SHOULD BE AROUND 300,000, AND I WAS SORT OF
25 RUNNING MY NUMBERS BASED UPON THAT, AND IT JUST DIDN'T SEEM

1 TO BE HAPPENING.

2 Q WHEN YOU SAY, MAGIC THREE YEARS, TELL THE COURT WHAT YOU
3 MEAN.

4 A THE RETIREMENT PENSION UNDER THE FEDERAL EMPLOYEE
5 RETIREMENT SYSTEM, FERS, CALCULATES YOUR PENSION BASED UPON
6 THE AVERAGE OF YOUR HIGH THREE YEARS. AND SO TYPICALLY
7 THAT'S THE LAST THREE YEARS THAT YOU WORK. AND SO I WAS VERY
8 INTERESTED IN MAKING SURE THAT MY LAST THREE YEARS AT THE
9 DORN VA I WAS GETTING THE MAXIMUM AMOUNT OF INCOME POSSIBLE
10 SO THAT -- BECAUSE THAT WOULD HAVE A SIGNIFICANT IMPACT ON MY
11 ULTIMATE PENSION AND MY FINANCIAL PLANNING FOR RETIREMENT.

12 Q DID YOU EXPLAIN THOSE CONCERNS TO DR. MILLER?

13 A YES.

14 Q OKAY. AND WHAT WAS DR. MILLER'S RESPONSE TO YOU?

15 A I DON'T RECALL ANY RESPONSE THAT -- I GUESS IT WAS JUST
16 HE WOULD LOOK INTO IT OR SOMETHING LIKE THAT. I DON'T -- I
17 DON'T RECALL WHAT HE SAID, QUITE HONESTLY. I JUST RECALL
18 WHAT HAPPENED AFTER THAT.

19 Q OKAY. AND TELL US WHAT HAPPENED AFTER THAT.

20 A WELL, SHORTLY AFTER MY CONVERSATION WITH DR. MILLER, HIS
21 ASSISTANT, ADMINISTRATIVE ASSISTANT WHO BASICALLY TOOK CARE
22 OF ADMINISTRATIVE THINGS AND SECRETARIAL DUTIES FOR DR.
23 MILLER APPROACHED ME AND SAID THEY'RE GOING TO BE HAVING A
24 PAY PANEL ON YOU AND WE WANT YOU TO SUBMIT A CURRENT CV AND
25 COPIES OF ANY ARTICLES THAT YOU HAVE WRITTEN AND ANY AWARDS

1 THAT YOU HAVE RECEIVED.

2 AND SO I WAS ENCOURAGED BY THAT THAT MY CONVERSATION
3 WITH DR. MILLER WAS SUCH THAT HE HAD ASKED FOR A PAY PANEL
4 AND THAT I WAS GOING TO PRESENT THIS INFORMATION, COPIES OF
5 PUBLICATIONS I HAD, AND THAT I WAS OPTIMISTIC THAT I WOULD
6 GET A RAISE BECAUSE THEY WERE LOOKING INTO THAT AND I WAS
7 GOING TO SHOW THEM A LOT OF MY ACCOMPLISHMENTS.

8 AND I HAD BEEN WORKING VERY, VERY HARD AT THE VA PRIOR
9 TO THAT TIME TAKING NOT ONLY CLINICAL DUTIES BUT
10 ADMINISTRATIVE DUTIES, SO I REALLY FELT I WAS DUE AND I WAS
11 HOPEFUL THAT THAT WAS GOING TO COME THROUGH FOR ME.

12 Q NOW, DID YOU IN FACT UNDERGO A COMPENSATION PANEL
13 REVIEW?

14 A I WAS NOT PRESENT. I LEARNED OF IT AFTER THE FACT.

15 Q OKAY. AND LET ME SHOW YOU -- THIS IS EXHIBIT NUMBER 8.
16 THIS IS ALREADY IN EVIDENCE. AND ASK YOU TO TAKE A LOOK AT
17 KENNEDY VA 12, WHICH IS A COMPENSATION PANEL ACTION FORM ON
18 YOU DATED FEBRUARY 26TH, 2014.

19 TAKE A LOOK AT THAT PLEASE, DR. KENNEDY, AND TELL US IF
20 THAT RELATES TO THE COMPENSATION PANEL REVIEW THAT WAS DONE
21 ON YOU AS A RESULT OF YOUR CONVERSATIONS AS YOU DESCRIBED.

22 A YES. I SAW THIS NOT TOO LONG AFTER IT HAD BEEN CREATED.

23 Q ALL RIGHT. AND WHAT WAS YOUR REACTION TO THAT?

24 A RATHER SIGNIFICANT DISAPPOINTMENT.

25 Q OKAY. NOW THAT DOCUMENT, KENNEDY VA 12, A PART OF

1 EXHIBIT NUMBER 8 SHOWS ON THE FIRST PAGE, REQUEST NO INCREASE
2 IN PAY. DO YOU SEE THAT THERE?

3 A YES.

4 Q AND WAS THAT IN FACT THE RESULT OF THAT PAY PANEL; THAT
5 YOU DID NOT RECEIVE ANY INCREASE IN PAY?

6 A THAT IS CORRECT.

7 Q OKAY. AND SO YOUR -- WOULD IT BE FAIR TO SAY THEN THAT
8 YOUR -- YOUR SALARY CONTINUED TO STAGNATE?

9 A YES.

10 Q ALL RIGHT, SIR. NOW, WHAT HAPPENED AFTER THAT FEBRUARY
11 OF 2014 COMPENSATION PANEL REVIEW AND YOUR CONTINUING TO MAKE
12 YOUR PLANS FOR RETIREMENT AND DOING YOUR FINANCIAL STUDIES
13 AND SO FORTH? WHAT WAS THE NEXT SIGNIFICANT EVENT IN THAT
14 PROCESS AS YOU -- IT BEGAN TO UNFOLD?

15 A WELL, I LOOKED AT THE PAY PANEL RESULTS OF FEBRUARY THE
16 26TH, 2014, AND I LOOKED AT THEM MORE CAREFULLY THAN I HAD IN
17 THE PAST AND I REALLY NOTICED THE TWO COMPONENTS, THE BASE
18 PAY AND MARKET PAY, AND I REALLY SORT OF -- THOSE WERE SORT
19 OF BURNED INTO MY MEMORY, AND THOSE NUMBERS WOULD PRETTY MUCH
20 SHOW UP ON EVERY PAYSTUB EVERY TWO WEEKS. SO I WAS SORT OF
21 FOCUSED ON THAT AND WONDERING SORT OF WHERE ALL THIS WAS
22 GOING.

23 Q DID YOU KNOW MUCH ABOUT THE BASE PAY AND MARKET PAY
24 ELEMENTS?

25 A AT THAT TIME I DON'T THINK I HAD VERY DETAILED KNOWLEDGE

1 ABOUT ALL OF THE INTRICACIES OF THESE PAY PANELS AND THE
2 FACTORS OR ANYTHING LIKE THAT.

3 Q SO YOU WERE BEGINNING TO THINK ABOUT THOSE THINGS; IS
4 THAT RIGHT?

5 A YES.

6 Q ALL RIGHT. WELL, WHAT HAPPENED NEXT?

7 A IN MAY DR. MILLER WAS AWAY FOR SOME REASON. HE MAY HAVE
8 BEEN ON LEAVE OR WENT TO A MEETING, I DON'T KNOW. BUT AS HE
9 OFTEN DID, HE ASKED ME TO SERVE AS ACTING CHIEF IN HIS
10 ABSENCE AND EXPLAINED THAT WHILE HE WAS ABSENT, THERE WAS
11 GOING TO BE A PAY PANEL ON A NEW HIRE, DR. ALGHOTHANI. AND
12 HIS ADMINISTRATIVE ASSISTANT, AL BROWN, THEN CAME TO ME AND
13 SAID, HERE IS A PIECE OF PAPER THAT SAYS YOU'RE TO ASK THE
14 PAY PANEL TO SUPPORT A TOTAL PAY AWARD TO DR. ALGHOTHANI OF
15 SOME -- SOMETHING AROUND \$288,500 OR SOMETHING LIKE THAT.

16 AND I REALLY DIDN'T GIVE IT MUCH THOUGHT. I -- OKAY,
17 I'LL GO TO THE PAY PANEL, WE NEED ANOTHER DOCTOR, I WILL ACT
18 IN DR. MILLER'S STED AND I WILL ASK THE PANEL TO APPROVE THIS
19 SALARY.

20 Q WELL NOW, YOU WENT IN DR. MILLER'S STED.

21 A YES.

22 Q SO YOU WERE NOT ONE OF THE THREE PANEL MEMBERS FOR DR.
23 ALGHOTHANI'S REVIEW. YOU WOULD HAVE BEEN THE PRESENTER AT
24 THAT PANEL?

25 A YES.

1 Q INSTEAD OF DR. MILLER WHO WAS NOT ABLE TO DO IT?

2 A YES.

3 Q LET ME SHOW YOU EXHIBIT NUMBER 5 --

4 A OKAY.

5 Q -- ALREADY IN EVIDENCE. AND THOSE ARE SOME DOCUMENTS
6 THAT I BELIEVE RELATE TO THAT REVIEW OF DR. ALGHOTHANI. AND
7 COULD YOU SEE IF YOU COULD FIND THAT REVIEW, THAT COMP PANEL
8 REVIEW FORM IN THAT EXHIBIT FOR US, AND TELL US IF THAT IS IN
9 FACT THE ONE THAT YOU SERVED ON AS THE PRESENTER.

10 A YES, THIS IS THE ONE I MADE THE PRESENTATION ON DR.
11 MILLER'S BEHALF.

12 Q ALL RIGHT. AND THIS ONE INDICATES ON THE SECOND PAGE --
13 THIS IS KENNEDY FIVE -- THAT DR. ALGHOTHANI WAS APPROVED FOR
14 AN AWARD OF ANNUAL PAY IN THE AMOUNT OF \$288,500. DO YOU SEE
15 THAT THERE?

16 A YES, I DO.

17 Q SOMEONE HAS HANDWRITTEN THAT IN?

18 A YES.

19 Q AND THAT WAS NOT YOU AS THE PRESENTER, BUT THAT WOULD
20 HAVE BEEN THE APPROVING OFFICIAL?

21 A I DON'T KNOW WHO WROTE IT. IT WAS AFTER THE MEETING.

22 Q OKAY. NOW, HOW LONG DID THAT PANEL REVIEW LAST? HOW
23 LONG DID IT TAKE FROM THE TIME YOU CAME IN AND, AS THE
24 PRESENTER, YOU MADE YOUR PRESENTATION, THE PANEL DID ITS
25 THING, HOW LONG DID ALL THAT TAKE?

1 A WELL, THERE WERE TWO PANELS AT THAT TIME. THERE WAS THE
2 ONE FOR DR. ALGHOTHANI AND THERE WAS ONE FOR ANOTHER
3 PHYSICIAN -- I THINK WAS AN ER PHYSICIAN. AND TO THE BEST OF
4 MY RECOLLECTION ON THE ER PHYSICIAN, I WAS A MEMBER OF THE
5 PANEL, AND THERE WERE TWO PHYSICIANS THAT WERE DETERMINED BY
6 THE SAME GROUP OF PEOPLE IN THAT ROOM.

7 Q OKAY. I'M FOCUSING ON DR. ALGHOTHANI'S --

8 A YES.

9 Q -- PANEL REVIEW WHERE YOU SERVED AS THE PRESENTER.

10 A BASICALLY -- OKAY.

11 Q WAS THAT ONE DONE SEPARATELY FROM THE OTHERS?

12 A YES. MY RECOLLECTION IS THAT IT WAS DONE FIRST, BUT I
13 COULDN'T SWEAR TO THAT, THAT'S JUST THE BEST -- THE BEST THAT
14 I COULD RECALL. BASICALLY THE H -- THERE WAS A PERSON FROM
15 HR THAT WAS BASICALLY CHAIRING THIS GROUP OF PEOPLE. AND
16 THEY SAID, WELL, I UNDERSTAND THAT THE ANESTHESIA DEPARTMENT
17 IS PROPOSING 288,500 FOR THIS NEW HIRE, AND I THINK I SAID,
18 YES, THAT'S CORRECT.

19 AND THERE WAS A VERY SHORT CONVERSATION WHERE THE HR
20 PERSON ASKED THE THREE PANEL MEMBERS DID ANYONE HAVE ANY
21 OBJECTION OR ANY PROBLEMS WITH PAYING DR. ALGHOTHANI
22 \$288,500. NOBODY SAID THEY HAD ANY OBJECTION, SO THE HR
23 REPRESENTATIVE SAID, WELL, I NEED YOU TO SIGN THE FORM, AND
24 SHE PASSED IT AROUND.

25 Q OKAY. AND WHAT WAS -- WHAT DID YOU NOTICE ABOUT THE

1 ANNUAL PAY, BASE PAY, MARKET PAY NUMBERS THAT ARE SHOWN ON
2 DR. ALGHOTHANI'S REVIEW?

3 A THOSE NUMBERS DID NOT -- THOSE WERE HANDWRITTEN
4 NUMBERS -- DID NOT APPEAR ON THIS FORM WHEN IT WAS PASSED
5 AROUND FOR SIGNATURE. I ONLY KNEW THAT A TOTAL PAY AMOUNT OF
6 \$288,500 IN TOTAL PAY WAS BEING APPROVED. AND AS I MENTIONED
7 TO YOU, I HAD SORT OF ETCHED IN MY MEMORY THE TWO COMPONENTS
8 OF PAY I HAD RECEIVED, AND I ASKED THE HR PERSON, I SAID,
9 WELL, OKAY, WE HAVE APPROVED THIS ANNUAL PAY FOR DR.
10 ALGHOTHANI, PLEASE TELL ME WHAT HIS MARKET PAY IS.

11 AND THE HR REPRESENTATIVE SAID, OKAY. SHE PULLED OUT A
12 CALCULATOR AND SHE CONSULTED SOME DOCUMENTS AND SHE SAID,
13 WELL, LET'S SEE, DR. ALGHOTHANI'S BASE PAY AS A NEW HIRE IS
14 \$98,967, AND LET'S SEE, I SUBTRACT THAT FROM \$288,500, DR.
15 ALGHOTHANI'S MARKET PAY WAS -- IS TO BE \$189,533.

16 Q WHAT WAS YOUR REACTION TO THAT?

17 A I WAS RATHER SURPRISED AND SOMEWHAT IRKED THAT A NEW
18 HIRE -- I KNEW THAT MINE WAS ABOUT 167,000 SOMETHING -- THAT
19 A NEW HIRE WITH NO YEARS OF ANESTHESIA EXPERIENCE WAS COMING
20 IN WITH A MARKET PAY \$20,000 MORE THAN MINE AND I MADE A
21 COMMENT TO HER. I SAID, I DON'T UNDERSTAND HOW IS THAT
22 APPROPRIATE THAT WE'RE PAYING ON \$20,000 IN MARKET PAY TO
23 THIS INDIVIDUAL WHERE MINE IS AROUND \$167,000? AND THE HR
24 PERSON JUST SORT OF SHRUGGED.

25 Q OKAY. NOW, AT THAT -- I'M NOT SURE I GOT AN ANSWER FROM

1 YOU. I WANT TO MAKE SURE OF HOW LONG DR. ALGHOTHANI'S PANEL
2 REVIEW TOOK. YOU DESCRIBED SORT OF WHAT HAPPENED, BUT CAN
3 YOU GUESSTIMATE OR ESTIMATE?

4 A I'D SAY FIVE, 10 MINUTES.

5 Q OKAY. NOW DURING THAT FIVE OR 10 MINUTES WAS THERE ANY
6 REVIEW OF MARKET PAY CRITERIA?

7 A IT WAS NOT DISCUSSED. THE FIRST TIME THE TERM MARKET
8 PAY CAME UP WAS WHEN I ASKED THE HR REPRESENTATIVE WHAT IS
9 THE MARKET PAY. IT HAD BEEN NO DISCUSSION ABOUT THAT. THERE
10 HAD BEEN NO DISCUSSION OF SURVEYS. THERE HAD BEEN NO
11 DISCUSSION OF ANYTHING EXCEPT WHAT WE'RE PROPOSING TO PAY THE
12 NEW HIRE.

13 Q ALL RIGHT. NOW, ON THE FIRST PAGE OF THE COMPENSATION
14 PANEL ACTION FORM, AS WE'VE ALSO SAID, THEY ARE -- IN PART B
15 ARE THOSE SEVEN FACTORS.

16 A YES.

17 Q WERE THOSE SEVEN FACTORS DISCUSSED?

18 A THEY WERE NOT.

19 Q OKAY. ALL RIGHT. WAS THERE ANY ATTEMPT IN THE PANEL
20 MEETING ITSELF TO ARRIVE AT A SEPARATE DISCRETE MARKET PAY
21 AMOUNT?

22 A THE ONLY MARKET PAY DETERMINATION WAS MADE BY THE HR
23 PERSON USING A CALCULATOR AS I HAVE DESCRIBED.

24 Q OKAY. NOW, WHAT DID YOU DO AFTER YOU ATTENDED THIS
25 PANEL AND DID THE PRESENTATION AND LEARNED ABOUT DR.

1 ALGHOTHANI'S MARKET PAY AMOUNT?

2 A I STARTED RESEARCHING THE MARKET PAY ISSUE IN SOME
3 DETAIL, REVIEWING THE STATUTE, REVIEWING THE HANDBOOK,
4 REVIEWING ANY VA KIND OF DOCUMENTS THAT I COULD FIND. I WAS
5 VERY CONCERNED BECAUSE DR. ALGHOTHANI WAS SIGNIFICANTLY
6 YOUNGER THAN I, AND I WAS VERY CONCERNED THAT THERE WAS A WAY
7 THAT YOUNGER PEOPLE WERE BEING GIVEN FAVORABLE TREATMENT.

8 AND AT SOME POINT DURING THIS PROCESS, AND I CAN'T
9 REMEMBER EXACTLY, I CONSULTED LEGAL COUNSEL AND I DECIDED
10 THAT SINCE THIS WAS SO SUSPICIOUS THAT I REALLY NEEDED TO SEE
11 HOW EVERYONE IN THE DEPARTMENT'S MARKET PAY WAS BEING HANDLED
12 AS -- BY THIS TIME I HAD SEEN WHAT THE FACTORS WERE AND I
13 COULDN'T SEE HOW LOOKING AT THE FACTORS WITH ALGHOTHANI
14 MARKET PAY OF 189 OR WHATEVER IT WAS COULD BE JUSTIFIED IN
15 COMPARISON TO WHAT I HAD BEEN AWARDED ONLY A FEW MONTHS
16 PREVIOUSLY.

17 Q NOW, LET ME STOP YOU JUST A SECOND.

18 A OKAY.

19 Q YOU MENTIONED THAT YOU CONSULTED LEGAL COUNSEL. THAT
20 WASN'T ME OR REBECCA.

21 A NO, IT WASN'T. NO.

22 Q AND I BELIEVE WE HAVE GOT A DOCUMENT IN EVIDENCE. THAT
23 WAS DR. LARRY KERR WHO IS ALSO--

24 A NO.

25 Q I'M SORRY.

1 A THE ATTORNEY I CONSULTED WAS MELISSA BURNETT.

2 Q OKAY. ALL RIGHT. BUT YOU CONSULTED LEGAL COUNSEL. AND
3 I INTERRUPTED YOU. SO AS A RESULT OF THAT AND GIVING
4 CONSIDERATION TO THESE THINGS, WHAT DID YOU DO NEXT?

5 A SHORTLY AFTER THIS ALGHOTHANI PAY PANEL I DID TWO
6 THINGS. I SENT AN E-MAIL TO THE EEO REPRESENTATIVE AT THE VA
7 EXPRESSING CONCERNS THAT MARKET PAY WAS BEING AWARDED IN A
8 DISCRIMINATORY MANNER BASED UPON AGE. AND I DIDN'T HAVE A
9 LOT OF INFORMATION AT THAT TIME AND I REQUESTED THAT SHE
10 INVESTIGATE THE ISSUE.

11 AT THE SAME TIME -- ABOUT THE SAME TIME I DECIDED TO DO
12 MY OWN INVESTIGATION, AND SO I SUBMITTED A REQUEST FOR
13 DOCUMENTS UNDER THE FREEDOM OF INFORMATION ACT ASKING FOR
14 COMPENSATION DOCUMENTS ON ALL THE ANESTHESIOLOGISTS AT THE
15 DORN.

16 Q ALL RIGHT. AND DID YOU EVENTUALLY RECEIVE A RESPONSE TO
17 THAT FOIA REQUEST?

18 A I RECEIVED THE DOCUMENTS -- SUBSTANTIAL COMPLIANCE WITH
19 THE REQUEST I THINK IN SEPTEMBER.

20 Q OF 2014?

21 A YES.

22 Q ALL RIGHT. AND WHAT DID YOU DO WITH THEM, THE
23 DOCUMENTS?

24 A WELL, I SPENT HOURS GOING THROUGH THE DOCUMENTS
25 COMPARING THE DIFFERENT MARKET PAY AMOUNTS, LOOKING AT WHAT I

1 THOUGHT WERE THE APPROXIMATE AGES OF THE ANESTHESIOLOGISTS.
2 THE VA DID NOT PROVIDE ME ANY BIRTH DATE OR AGE INFORMATION.
3 ALL OF THAT WAS BLOCKED OUT AND REDACTED FROM THE MATERIALS
4 THAT I HAD RECEIVED. AND SO I JUST ASKED MY COLLEAGUES THEIR
5 AGES, AND SO I -- I BASICALLY HAD THAT INFORMATION.

6 I HAD THE DOCUMENTATION, MUCH OF WHICH WE HAVE SEEN
7 TODAY, THESE COMPENSATION PANEL REPORTS. AND IN ORDER TO
8 SORT OF MAKE SENSE OF IT, I STARTED COMPILING CHARTS THAT
9 MADE A NUMBER OF DIFFERENT COMPARISONS. ONE OF THE CHARTS
10 LISTED THE ANESTHESIOLOGIST BY AGE AND THE MARKET PAY
11 DETERMINATIONS AND IT STRUCK ME JUST QUITE VIVIDLY AT THAT
12 TIME THAT THERE WAS A CLEAR INVERSE CORRELATION BETWEEN AGE
13 OF ANESTHESIOLOGISTS AND MARKET PAY AWARDS.

14 Q TELL US WHAT YOU MEAN BY THAT.

15 A WELL, I WAS THE OLDEST. MY MARKET PAY WAS THE LOWEST.
16 AND AS I WENT DOWN TO DR. PRYOR, HE GOT A LITTLE MORE MARK --
17 HE WAS A LITTLE YOUNGER THAN ME. HE GOT A LITTLE HIGHER
18 MARKET PAY. AND I WENT DOWN TO THE NEXT YOUNGER PHYSICIAN.
19 HIS MARKET PAY WAS A LITTLE HIGHER. AND THEN THE LAST TWO,
20 WHO WERE THE YOUNGEST, THEIR MARKET PAY WAS HIGHER STILL AND
21 PRETTY MUCH ALMOST EQUIVALENT TO EACH OTHER WITHIN LESS THAN
22 A THOUSAND DOLLARS.

23 Q AND THOSE TWO WERE SUBSTANTIALLY YOUNGER THAN YOU ARE?

24 A YES.

25 Q AND YOUNGER THAN DR. PRYOR OR EVEN DR. PENDER.

1 A YES. AND I WAS CONCERNED THAT ONCE I REALLY LOOKED AT
2 THE DOCUMENTS, IT APPEARED THAT -- YOU KNOW, I KNEW WHAT -- I
3 KNEW ABOUT THE -- BY THIS -- BY THIS TIME I HAD RESEARCHED
4 AND UNDERSTOOD THE BASE PAY TABLES AND THE STEP INCREASES.
5 AND I SAW THAT BASICALLY THE CUMULATIVE STEP INCREASES THAT I
6 HAD RECEIVED SORT OF MATCHED THE DIFFERENCE BETWEEN MY MARKET
7 PAY AND DR. ALGHOTHANI'S. AND SO WHAT IT APPEARED TO ME IS
8 THAT THE VA HAD BASICALLY SAID, OKAY, THE MARKET PAY WILL
9 BE--

10 MRS. BAILEY: OBJECTION. SPECULATIVE.

11 THE COURT: HOW IS THAT SPECULATIVE?

12 MRS. BAILEY: HE'S SAYING WHAT THE VA THOUGHT.

13 THE COURT: I THINK HE SAID WHAT THE VA SAID. DID
14 YOU SAY WHAT THE VA--

15 THE WITNESS: I AM SAYING WHAT MY INTERPRETATION OF
16 THE DOCUMENTS ARE, YOUR HONOR.

17 MRS. BAILEY: HE'S GOT NO -- THERE'S NO FOUNDATION
18 FOR HIS OPINION.

19 THE COURT: ALL RIGHT. SUSTAINED.

20 MR. IRVIN: I WILL TRY TO GO AT IT ANOTHER WAY.

21 BY MR. IRVIN:

22 Q YOU GOT THIS INFORMATION THAT DEMONSTRATED AN INVERSE
23 CORRELATION BETWEEN AGE AND MARKET PAY AS YOU HAVE DESCRIBED.

24 A YES.

25 Q ALL RIGHT. AND YOU HAVE RECEIVED THIS INFORMATION UNDER

1 FOIA AND AT THAT TIME YOU HAD NOT RETAINED COUNSEL, AT LEAST
2 YOU HADN'T RETAINED US; IS THAT RIGHT?

3 A THAT'S RIGHT.

4 Q OKAY. BUT DID YOU GET SOMEBODY TO TRY TO HELP YOU WITH
5 THAT, TRYING TO ANALYZE THAT AND FIGURE OUT HOW TO PURSUE IT?
6 YOU'VE -- YOU INDICATED THAT YOU WERE GETTING IN TOUCH WITH
7 PEOPLE AT THE VA ABOUT IT.

8 A WELL, I -- AFTER I HAD OBTAINED ALL THE FOIA INFORMATION
9 I HAD CONSULTED WITH OTHER COUNSEL. AND BASED UPON THAT
10 COUNSEL'S ADVICE, I SUBMITTED TO THE EEO REPRESENTATIVE --
11 WHO I ORIGINALLY JUST SENT A BRIEF E-MAIL -- I PRESENTED S
12 VERY DETAILED WRITTEN COMPLAINT IN WHICH I ATTACHED THE
13 VARIOUS CHARTS THAT I HAD PREPARED SHOWING THE PROBLEM
14 BETWEEN AGE AND MARKET PAY TO THAT EEO REPRESENTATIVE AS
15 BASICALLY MY FORMAL COMPLAINT TO THE LOCAL EEO OFFICER.

16 Q OKAY. AND WHAT HAPPENED NEXT IN THAT PROCESS, DR.
17 KENNEDY?

18 A WELL, I DIDN'T HEAR ANYTHING FOR A LONG TIME. AND
19 FINALLY I CONTACTED THE EEO OFFICER AND I SAID, WHAT'S THE
20 STORY ON MY COMPLAINT? AND SHE SAID, I HAVE CONSULTED WITH
21 HR AND THEY SAID THAT SINCE YOUR TOTAL PAY WAS THE HIGHEST IN
22 THE DEPARTMENT, THAT YOU DIDN'T HAVE ANY LEGITIMATE
23 COMPLAINT.

24 Q AND SO WHAT DID YOU DO NEXT?

25 A FURTHER CONSULTED WITH MY COUNSEL AT THAT TIME. AND

1 BASED UPON RECOMMENDATIONS I HAD RECEIVED AS FAR AS MY
2 OPTIONS FROM THE EEO OFFICER, IN CONSULTATION WITH MY COUNSEL
3 I REQUESTED TO HAVE A AGENCY MEDIATION.

4 Q ALL RIGHT. AND DID YOU IN FACT HAVE A MEDIATION?

5 A I DID.

6 Q ALL RIGHT. AND WHO WAS INVOLVED? WHO WERE THE PLAYERS
7 IN THAT MEDIATION?

8 A THERE WAS A MEDIATOR, BUT I DON'T RECALL HIS NAME. HE
9 REALLY PLAYED A VERY -- VIRTUALLY NO ROLE AND SORT OF WATCHED
10 THE DISCUSSION. FOR THE VA THERE WAS EDITH LEWIS WHO WAS
11 COUNSEL FOR THE VA AND TAMARA NICHOLS, AND I WAS PRESENT
12 ALONG WITH A FRIEND OF MINE NAMED LARRY KERR WHO LIKE ME IS
13 AN MDJD AND HAD DONE THE REVERSE OF I. HE HAD GONE FROM
14 MEDICINE TO LAW, AND HE WAS A LICENSED ATTORNEY.

15 MY COUNSEL AT THAT TIME WAS UNABLE -- SHE WAS TIED UP
16 WITH A LOT OF OTHER CASES AND WAS NOT ABLE TO ATTEND THE
17 MEDIATION WITH ME, AND SO I ASKED DR. KERR TO ATTEND AS MY
18 REPRESENTATIVE.

19 Q OKAY. SO YOU HAD THE MEDIATION. AND DID YOU AIR YOUR
20 CONCERNS AND YOUR COMPLAINT AT THE MEDIATION?

21 A I DID. AND THERE WAS -- I WAS SOMEWHAT DISAPPOINTED
22 BECAUSE I HAD THOUGHT AT A MEDIATION THAT THE REPRESENTATIVE
23 FOR THE VA WOULD COME WITH SOME TYPE OF COMPROMISE OFFER,
24 SOME KIND OF AUTHORITY--

25 MRS. BAILEY: OBJECTION TO WHAT HAPPENED AT THE

1 MEDIATION.

2 THE COURT: SUSTAINED.

3 BY MR. IRVIN:

4 Q OKAY. WERE YOU ABLE TO RESOLVE THE MATTER AT MEDIATION?

5 A IT WAS NOT.

6 Q OKAY. AND SO WHAT DID YOU DO NEXT IN TERMS OF YOUR
7 CONCERNS ABOUT THIS INVERSE CORRELATION BETWEEN AGE AND
8 MARKET PAY RELATIVE TO YOU AND THE OTHER STAFF
9 ANESTHESIOLOGISTS?

10 A MY RECOLLECTION IS THAT I -- MY NEXT STEP WAS THAT I
11 ENGAGED YOUR SERVICES.

12 Q WELL, LET'S DO THIS. DID YOU IN 2015, EARLY 2015, HAVE
13 OCCASION TO MEET WITH OR TALK WITH DR. DEKONING?

14 A YES.

15 Q ALL RIGHT. AND TELL US ABOUT THAT, PLEASE.

16 A I BASICALLY WENT THROUGH THE ARGUMENTS THAT I HAD MADE
17 TO THE EEO OFFICER AND THAT I HAD MADE DURING MEDIATION.

18 Q AND THIS WOULD HAVE BEEN IN A MEETING WITH DR. DEKONING?

19 A YES, IN HIS OFFICE. HE HAD ASKED TAMARA NICHOLS TO BE
20 THERE.

21 Q ALL RIGHT. NOW, DID YOU GIVE HIM ANY KIND OF HEADS-UP
22 ABOUT WHAT IT WAS YOU WANTED TO DISCUSS OR DID YOU SEND HIM
23 ANYTHING TO LOOK AT PRIOR TO MEETING?

24 A I DON'T RECALL EXACTLY WHAT I TOLD HIM PRIOR TO OUR
25 MEETING.

1 Q OKAY. AND WHEN YOU CAME TO THE MEETING, DID YOU BRING
2 WITH YOU INFORMATION?

3 A YES, I BROUGHT WITH HIM THE VARIOUS CHARTS THAT I HAD
4 PREPARED THAT SHOWED ALL OF THESE PROBLEMS WITH THE
5 COMPUTATION OF MY MARKET PAY COMPARED TO MY COLLEAGUES, AND
6 HE HAD TAMARA NICHOLS THERE WHO BASICALLY SAID THAT I WAS
7 MISTAKEN, THAT IT -- THE WAY THAT THEY DID THIS IS THE VA
8 CONSIDERED THE AMOUNT OF MY BASE PAY IN DETERMINING MY MARKET
9 PAY.

10 IT DIDN'T SAY AT THAT TIME THAT THE COMPENSATION PANELS
11 WERE TO DETERMINE TOTAL, TOTAL PAY AND THEN THEY DID THE
12 ARITHMETIC COMPUTATION. THAT -- THAT REPRESENTATION WAS
13 BASICALLY MADE LATER ONCE WE WERE IN THIS LITIGATION. BUT AT
14 THAT MEETING WITH DR. DEKONING, THEY WERE -- TAMARA WAS
15 TAKING THE POSITION THAT IT WAS PERFECTLY APPROPRIATE FOR
16 THEM TO CONSIDER MY BASE PAY IN DETERMINING MY MARKET PAY,
17 AND I WAS SOMEWHAT FLABBERGASTED BY THAT AND EXPRESSED THAT
18 TO DR. DEKONING AS THAT IT APPEARED THAT WHEN THEY CONSIDERED
19 MY BASE PAY, THEY WERE PENALIZING ME FOR MY CUMULATIVE STEP
20 INCREASES AND THAT THE NUMBER SIX OR WHATEVER IN THE FACTORS
21 WHERE THE LENGTH OF VA EXPERIENCE IS LISTED, I ALWAYS
22 INTERPRETED THAT TO BE A POSITIVE FACTOR.

23 BUT BY INTERPOSING THIS POSITION -- AND I USED SOME OF
24 THE LANGUAGE FROM THE HANDBOOK WHERE HAD THESE PARENT -- SORT
25 OF AMBIGUOUS PARENTHETICALS ABOUT LOOKING AT BASE PAY PLUS

1 MARKET PAY, TAMARA HAD SUGGESTED, WELL, THAT GIVES US
2 AUTHORITY TO CONSIDER YOUR BASE PAY IN DETERMINING YOUR
3 MARKET PAY.

4 I SAID, WELL, BASICALLY WHAT YOU'RE DOING IS RATHER THAN
5 GIVING ME A POSITIVE RESULT FROM MY VA EXPERIENCE, MY MARKET
6 PAY, THE -- MY PRIOR EXPERIENCES AT THE VA IS A NEGATIVE, AND
7 SO THAT'S BEING HELD AGAINST ME IN THE DETERMINATION OF MY
8 MARKET PAY. DR. DEKONING SEEMED TO BE CONCERNED AND HE
9 INDICATED THAT HE WOULD LOOK INTO IT.

10 Q OKAY. AND YOU'VE HEARD DR. DEKONING'S TESTIMONY IN THE
11 CASE AND THE EXCHANGE OF E-MAILS THAT HE HAD WITH TAMARA
12 NICHOLS ABOUT GATHERING INFORMATION AND ABOUT HOW THE FORMS
13 WERE BEING COMPLETED; IS THAT CORRECT?

14 A YES.

15 Q ALL RIGHT. WELL, WERE YOU EVER ABLE TO GET IT RESOLVED
16 SATISFACTORILY AS A RESULT OF MEETING WITH DR. DEKONING?

17 A NO.

18 Q OKAY. NOW, LET ME MOVE NOW TO THE MAY 1ST, 2015 PANEL
19 REVIEWS THAT WERE DONE OF ALL OF THE STAFF ANESTHESIOLOGISTS.
20 WHAT WERE YOUR -- WHAT WAS YOUR UNDERSTANDING OF HOW THAT
21 CAME ABOUT?

22 A HAD TO COME ABOUT EITHER BECAUSE I HAD BROUGHT THIS
23 ISSUE UP OR BECAUSE DR. DEKONING WAS CONCERNED ABOUT THE
24 APPARENT LACK OF MUCH DOCUMENTATION ON THE COMPENSATION
25 PANEL'S FORMS THAT I HAD OBTAINED THROUGH FOIA AND WAS VERY

1 CONCERNED ABOUT.

2 Q OKAY. AND THAT DOCUMENT IS IN EVIDENCE, THAT IS
3 EXHIBIT 8, AND I THINK YOU ALREADY HAVE IT THERE IN FRONT OF
4 YOU. BUT THE RESULT OF THOSE MAY 1ST, 2015 REVIEWS WAS THAT
5 NOBODY GOT ANY INCREASE; IS THAT...

6 A THAT IS CORRECT.

7 Q ALL RIGHT. AND IS THAT PART OF THE STAGNATION ISSUE
8 THAT YOU MENTIONED EARLIER THAT WAS OF A CONCERN TO YOU THAT
9 YOU SPOKE TO DR. MILLER ABOUT?

10 A WELL, MY CONCERN HAD REALLY MOVED BEYOND STAGNATION TO
11 MY CONCERN WITH THE UNFAIR WAY THAT I WAS BEING TREATED WITH
12 REGARD TO MY MARKET PAY.

13 Q RICK, BASED ON YOUR CONVERSATIONS WITH TAMARA NICHOLS
14 AND DR. DEKONING AND OTHERS AND THE INFORMATION THAT YOU
15 GATHERED AND YOUR PARTICIPATION AT THAT PAY PANEL FOR DR.
16 ALGHOTHANI, WHAT WAS YOUR UNDERSTANDING OF HOW MARKET PAY
17 AWARDS WERE ARRIVED AT?

18 A IN THAT TIME, TIME PERIOD AROUND MAY OF 2015, IT WAS MY
19 UNDERSTANDING THAT THEY WERE DETERMINING MARKET PAY BY USING
20 THE FACTORS PLUS LOOKING AT BASE PAY AND USING THAT BASICALLY
21 AS A NEGATIVE FACTOR SO THAT, YOU KNOW, IF YOU WERE
22 OTHERWISE -- LIKE IF ALGHOTHANI WAS ENTITLED TO 189,000 THAT
23 I WOULD HAVE TO BE REDUCED BECAUSE I HAD CUMULATIVE STEP
24 INCREASES AS PART OF MY BASE PAY. SO THEY WERE USING -- THAT
25 WAS MY IMPRESSION AROUND THAT TIME IN MAY OF 2015.

1 Q HERE'S WHAT I'M DRIVING AT. BASED ON ALL OF THAT THAT
2 YOU LEARNED AND THE PEOPLE THAT YOU SPOKE WITH INCLUDING
3 TAMARA NICHOLS AND SO FORTH, WHAT -- HOW DID YOU UNDERSTAND
4 THAT THEY CALCULATED THE MARKET PAY AMOUNT?

5 A THEY -- AS I HAD SEEN THEM DO IT IN DR. ALGHOTHANI'S PAY
6 PANEL WAS THAT THEY DETERMINED WHATEVER TOTAL PAY THAT THEY
7 HAD COME UP WITH AND THEY LOOKED AT THE CHART AND DETERMINED
8 WHAT THE BASE PAY WAS, WHICH IS A COMBINATION OF INITIAL PLAY
9 PLUS THE STEP INCREASES, SUBTRACTED THAT FROM THE TOTAL PAY
10 AMOUNT AND, VOILA, THAT WAS THE MARKET PAY.

11 Q OKAY. WELL, WHAT'S THE PROBLEM WITH THAT? WHAT'S THE
12 BEEF THERE WITH IT IF THEY DO IT THAT WAY? WHY DOESN'T THAT
13 WORK OUT GOOD?

14 A THE BEEF THAT I HAVE IS THAT I DIDN'T RECEIVE THE
15 RECOGNITION FINANCIALLY FOR THE YEARS OF SERVICE THAT I WOULD
16 HAVE RECEIVED HAD IT BEEN DONE PROPERLY AND I HAD BEEN
17 PROPERLY FINANCIALLY AWARDED, THAT I HAD RECEIVED MARKET PAY
18 COMMENSURATE WITH MY COMPARISON TO MY COLLEAGUES AND THAT MY
19 TOTAL PAY WAS MORE THAN THEM BECAUSE OF MY LONGEVITY AT THE
20 VA. IN OTHER WORDS, THAT MY BASE PAY CUMULATIVE STEP
21 INCREASES WOULD BE ON TOP OF THAT.

22 Q NOW DR. KENNEDY, THE NEXT PAY REVIEW THAT WAS DONE -- AS
23 IS IN EVIDENCE ALREADY AND AS YOU ARE FAMILIAR WITH -- WOULD
24 BE THE 2016 PAY REVIEWS WHERE THERE WAS TO BE NO PAY
25 DISPARITY. YOU'RE FAMILIAR WITH THAT; ARE YOU NOT?

1 A YES, I AM.

2 Q AND YOU DID GET SOME INCREASE, DID YOU NOT, IN YOUR
3 ANNUAL SALARY?

4 A I GOT LITTLE OVER A THOUSAND-DOLLAR INCREASE.

5 Q OKAY. HOW DID YOUR INCREASE COMPARE TO THE OTHERS?

6 A MOST OF THE OTHER PEOPLE GOT INCREASES OF FIVE TO
7 \$6,000.

8 Q AND WAS THAT IN THEIR MARKET PAY AWARD?

9 A YES, IT WAS.

10 Q AND YOUR MARKET PAY INCREASED BY A THOUSAND DOLLARS?

11 A THOUSAND, LITTLE BIT OVER A THOUSAND.

12 Q OKAY. AND -- OKAY. NOW RICK, WE HAVE TWO EXHIBITS,
13 EXHIBIT 18 AND EXHIBIT 20 THAT I WANT TO GO OVER WITH YOU,
14 BUT LET ME START BY ASKING YOU THIS. WHAT IS IT THAT YOU ARE
15 ASKING THE COURT TO DO IN THIS CASE?

16 A I'M ASKING THIS COURT TO LOOK BACK AT THESE COMPENSATION
17 PANEL HEARINGS AND ENSURE THAT THE GOVERNMENT OFFICIALS
18 COMPLY WITH THE STATUTE PASSED BY CONGRESS AND SEPARATELY
19 DETERMINE MARKET PAY AS REQUIRED BY THE STATUTE, AND THAT IF
20 THAT IS DONE AND ALL OF THE FACTORS ARE CONSIDERED, THAT MY
21 MARKET PAY FOR THESE VARIOUS PERIODS OF TIME WHEN THESE
22 COMPENSATION PANELS WERE HELD, THAT MY MARKET PAY SHOULD BE
23 NO LESS THAN THE MARKET PAY AWARDED TO ONE OF MY COLLEAGUES,
24 ALL OF WHOM WERE YOUNGER, AT A CLOSE POINT IN TIME.

25 IN OTHER WORDS, IF SOMEONE COUPLE MONTHS PREVIOUSLY HAD

1 BEEN AWARDED MARKET PAY OF A \$190,000 AND A FEW MONTHS LATER
2 MY MARKET PAY CAME UP FOR REVIEW, MY MARKET PAY SHOULD BE NO
3 LESS, SINCE LOOKING AT THE FACTORS, THAN THAT AWARDED ONE OF
4 MY COLLEAGUES.

5 Q ALL RIGHT. SO TAKE A LOOK AT EXHIBIT 18 IF YOU WOULD,
6 PLEASE -- AND THIS IS IN EVIDENCE WITHOUT OBJECTION. AND
7 TELL US FIRST OFF IS THAT A DOCUMENT THAT YOU YOURSELF
8 CREATED?

9 A IT IS.

10 Q OKAY. AND WHAT DID YOU ATTEMPT TO DO WITH EXHIBIT 18?

11 A WHAT I ATTEMPTED TO DO WAS GO BACK FOR EACH OF MY
12 COMPENSATION PANEL DOCUMENTS AND SEE WHO -- WHAT -- WHICH OF
13 MY COLLEAGUES HAD THEIR COMPENSATION ADDRESSED AT A SIMILAR
14 TIME BECAUSE I FELT THAT UNDER THE -- CONSIDERING ALL OF THE
15 FACTORS, THAT AGAIN, I SHOULD ALWAYS COME OUT ON TOP BECAUSE
16 VIRTUALLY ALL OF THE FACTORS WERE ESSENTIALLY IDENTICAL OTHER
17 THAN LENGTH OF VA SERVICE WHERE I CLEARLY HAD AN EDGE OVER
18 ALL OF MY COLLEAGUES.

19 AND SO, FOR EXAMPLE, SO MY VERY FIRST PAY PANEL WAS ON
20 MARCH THE 8TH OF 2006, WHICH I GUESS WAS AFTER THE PAY ACT
21 HAD BEEN ENACTED, AND MY MARKET PAY WAS HIGHER THAN DR.
22 MILLER WHO WAS THEN A STAFF ANESTHESIOLOGIST OR DR. PRYOR,
23 AND SO I HAVE NO BEEF WITH THE COMPENSATION PANEL THAT
24 OCCURRED ON THAT DATE.

25 Q AND THAT'S PARAGRAPH NUMBER ONE OF EXHIBIT 18?

1 A THAT'S PARAGRAPH NUMBER ONE.

2 Q ALL RIGHT.

3 A THEN PARAGRAPH NUMBER TWO I LOOKED AT MY NEXT
4 COMPENSATION PANEL, WHICH WAS ON DECEMBER THE 14TH OF 2007.
5 AND I LOOKED AT THAT COMPENSATION PANEL AND I SAW THAT I WAS
6 AWARDED \$156,000 IN MARKET PAY, WHICH I THINK WAS THE AMOUNT
7 THAT I HAD BEEN AWARDED BACK IN '06, BUT DR. PRYOR ON THE
8 EXACT SAME DATE -- WAS PERPLEXING TO ME -- AWARDED 165,000 --
9 OVER \$165,000 IN MARKET PAY.

10 Q LET ME STOP YOU AND ASK YOU A FEW QUESTIONS.

11 A YES.

12 Q DR. PRYOR, NUMBER ONE, HAS LESS VA EXPERIENCE THAN YOU
13 DO; CORRECT?

14 A YES. I HIRED DR. PRYOR.

15 Q AND NUMBER TWO, HE'S YOUNGER.

16 A YES, HE'S YOUNGER.

17 Q ALL RIGHT. MOVE TO PARAGRAPH NUMBER THREE.

18 A PARAGRAPH THREE I LOOKED AT MY NEXT COMPENSATION PANEL
19 DECISION, WHICH WAS ON JANUARY THE 11TH OF 2010, AND I --
20 THERE WAS ANOTHER ANESTHESIOLOGIST, STAFF ANESTHESIOLOGIST,
21 WHO WAS REVIEWED AT THAT TIME, DR. LEDER, WHO IS NO LONGER AT
22 THE VA. AND ON EXACT SAME DATE WITH THE EXACT SAME PANEL
23 MEMBERS, DR. LEDER WAS AWARDED 179,000, SIGNIFICANTLY MORE
24 THAN I.

25 AND COMPARING MY EXPERIENCE AND ET CETERA WITH DR.

1 LEDER, AGAIN I HAD BASICALLY SIMILAR BACKGROUNDS ON THE OTHER
2 FACTORS EXCEPT I HAD MORE VA EXPERIENCE, AND SO I HAD ASKED
3 THAT ON THAT DATE THAT I RECEIVE NO LESS THAN WHAT DR. LEDER
4 RECEIVED AND -- AS A COMPENSATION PANEL MARKET PAY AWARD.

5 Q IS HE YOUNGER THAN YOU, DR. LEDER?

6 A YES.

7 Q OKAY. PARAGRAPH FOUR.

8 A THE NEXT COMPENSATION PANEL DOCUMENT I HAD OBTAINED
9 THROUGH FOIA WAS THE ONE ON MARCH 1ST, 2012, WHICH AGAIN I
10 HAD THE SAME AWARD MARKET PAY. BUT PRIOR TO THAT DR. CARTER,
11 WHO WAS SIMILAR TO ME IN EXPERIENCE, HE HAD A LITTLE MORE
12 TIME IN ANESTHESIA, BUT HIS VA EXPERIENCE WAS SIGNIFICANTLY
13 LESS THAN MINE. I DON'T -- HE HAD MAYBE ONE YEAR COMPARED TO
14 WHAT I HAD. AND SO I FELT THAT I SHOULD BE AWARDED NO LESS
15 THAN WHAT DR. CARTER HAD BEEN AWARDED IN THE PREVIOUS YEAR.

16 AND SO I'M ASKING THE COURT TO REQUEST THAT THE
17 COMPENSATION PANEL AWARD FOR ME FOR 3/1/12 BE CORRECTED FROM
18 167,738 TO 187,013.

19 Q AND FOR THAT PERIOD SHOWN THERE ON PARAGRAPH FOUR.

20 A YES.

21 Q ALL RIGHT. WHAT ABOUT PARAGRAPH FIVE? DID YOU DO THE
22 SAME ANALYSIS THERE IN PARAGRAPH FIVE USING INSTEAD THERE DR.
23 ALGHOTHANI WHO WAS REVIEWED AROUND THAT SAME TIME AND WHOSE
24 MARKET PAY AWARD IS SHOWN THERE --

25 A YES.

1 Q -- AND AS IS YOURS AND YOU DID THE SAME CALCULATION TO
2 COMPUTE THE DIFFERENCE IN MARKET PAY AND WHAT YOU'RE ASKING
3 THE COURT TO AWARD IN THIS CASE FOR THAT PERIOD.

4 A I'M ASKING THE COURT TO ASK THE VA TO GO BACK AND
5 CORRECT THESE MARKET PANEL AWARDS FOR EACH PERIOD AND THAT
6 WHATEVER THE RESULTING RESULT OF THAT, THAT I BE -- RECEIVE
7 APPROPRIATE BACK-PAY AND INTEREST AND CORRECTION TO MY
8 PENSION.

9 Q OKAY. AND ON THROUGH THE DOCUMENT, WITHOUT GOING
10 THROUGH PARAGRAPH BY PARAGRAPH --

11 A YES, SIR.

12 Q -- YOU ATTEMPTED TO DO THE SAME ANALYSIS AND APPLY THAT
13 TO SUBSEQUENT PERIODS OF TIME BASED ON YOUR REVIEWS GOING
14 FORWARD.

15 A YES.

16 Q IS THAT A FAIR STATEMENT?

17 A YES, I DID.

18 Q AND THE SECOND PAGE OF EXHIBIT 18 IS JUST A SUMMARY.
19 AND YOU ADDED UP THE ADDITIONAL MARKET PAY THAT YOU SAY IS
20 SHOWN BY THIS EXHIBIT THAT TOTALS \$163,852.14?

21 A THAT IS CORRECT.

22 Q AND THAT IS HOW YOU ARE REASONABLY TRYING TO CALCULATE
23 HOW YOU HAVE BEEN INJURED IN TERMS OF THESE MARKET PAY
24 AWARDS.

25 A THAT'S CORRECT.

1 Q OKAY. NOW DR. KENNEDY, DO -- DOES THE IMPACT THAT YOU
2 HAVE HAD ON YOUR MARKET PAY AWARDS, WHICH RESULTS IN AN
3 IMPACT ON YOUR TOTAL PAY --

4 A YES.

5 Q -- HAS THAT ALSO BROUGHT AN IMPACT TO YOUR POTENTIAL OR
6 NOW YOUR ACTUAL PENSION BENEFITS THAT YOU RECEIVE FROM THE VA
7 FOLLOWING YOUR RETIREMENT?

8 A YES. IF I HAD RECEIVED APPROPRIATE MARKET PAY FOR THE
9 APPROPRIATE -- FOR THE COMPENSATION PANELS GOING BACK AT
10 LEAST BEYOND THE LAST THREE YEARS, WHICH ARE APPROPRIATE FOR
11 CALCULATING MY PENSION, THEN MY TOTAL SALARY FOR THOSE -- FOR
12 MY HIGH THREE YEARS WOULD OBVIOUSLY BE HIGHER. AND SINCE MY
13 PENSION IS CALCULATED BASED UPON THE HIGH THREE AVERAGE, MY
14 PENSION WOULD BE HIGHER IF THE MARKET PAY AWARDS HAD BEEN
15 APPROPRIATE AS I HAVE STATED.

16 Q OKAY. AND EXHIBIT 20, YOU GOT THAT IN FRONT OF YOU AND
17 THAT'S IN EVIDENCE WITHOUT OBJECTION. IS THAT YOUR
18 CALCULATIONS THAT YOU DID TO CALCULATE THE IMPACT TO YOUR
19 PENSION BENEFITS THAT RESULT FROM THE DEFICIENT MARKET PAY
20 AWARDS?

21 A YES. THERE'S SOME CORRECTIONS ON THIS, BUT I -- THIS
22 IS -- THIS IS WHAT I PREPARED. IT'S AN ATTEMPT TO
23 APPROXIMATE WHAT I THINK THE IMPACT ON MY PENSION WOULD HAVE
24 BEEN.

25 Q ALL RIGHT, SIR. AND YOU DID THAT BASED ON THE

1 INFORMATION THAT YOU RECEIVED FROM THE VA.

2 A I BASED THIS ON THE FOIA INFORMATION AND -- WHICH WAS
3 PRETTY MUCH CONFIRMED BY THE DISCOVERY MATERIALS THAT WE
4 OBTAINED AFTER THE FILING OF THIS LAWSUIT AND THEN THE
5 VARIOUS PAY PERIODS THAT ARE LISTED ON THE ATTACH -- PAGES
6 ATTACHED TO THE PENSION CALCULATION. I WENT THROUGH ALL MY
7 PAY STUBS FOR THE LAST 78 PAY PERIODS, WHICH IS THREE YEARS,
8 AND LOOKED AT THE IMPACT PAY PERIOD PER PAY PERIOD SO I COULD
9 GET AS CLOSE AS I POSSIBLY COULD COME UP WITH THE NUMBERS FOR
10 PENSION IMPACT.

11 Q OKAY. AND WHAT ARE YOU ASKING THE COURT TO DO WITH
12 RESPECT TO YOUR PENSION?

13 A I'M ASKING THE COURT TO ORDER THE VETERAN'S
14 ADMINISTRATION TO MAKE APPROPRIATE CORRECTIONS TO THE
15 COMPENSATION PANEL DECISIONS ENSURING THAT I RECEIVE FAIR
16 TREATMENT COMPARED TO MY COLLEAGUES AND THAT THE COMPENSATION
17 PANEL AWARDS TO COLLEAGUES SIMILAR IN POINT OF TIME TO ME,
18 THAT -- COMPARING TO ME -- THAT MY MARKET PAY AWARDS WOULD BE
19 NO LESS THAN THE AWARDS MADE TO THOSE COLLEAGUES WHO ARE
20 YOUNGER AND HAVE LESS VA EXPERIENCE THAN I, AND THAT BASED
21 UPON THOSE CORRECTIONS THAT THE COURT ASK THE VETERAN'S
22 ADMINISTRATION AND OFFICE OF PRACTICE MANAGEMENT, WHOEVER
23 DOES THESE CALCULATIONS, TO-RE CALCULATE WHAT MY INCOME
24 SHOULD HAVE BEEN AFTER THOSE CORRECTIONS AND THAT I WILL BE
25 PAID BACK-PAY AND INTEREST FOR THAT AND THAT THOSE

1 CORRECTIONS TO MY SALARY, THAT THE VA OR OPM MAKE CORRECTIONS
2 TO MY PENSION BENEFIT BASED UPON THOSE COMPENSATION PANEL
3 CORRECTIONS.

4 Q ALL RIGHT, SIR. I WANT TO SHOW YOU WHAT WAS MARKED FOR
5 IDENTIFICATION AS DEFENDANT'S EXHIBIT 6. AND THIS APPEARS TO
6 BE SOME TYPE OF COMPARISON MARKET PAY INFORMATION AND SO
7 FORTH AMONG YOU AND THEN SOME OTHER PHYSICIANS, OTHER LOCALES
8 AND SO FORTH AS MAY BE SHOWN ON EXHIBIT --

9 A YES.

10 Q -- NUMBER 5 OF DEFENDANT'S WHICH -- WHICH IS IN
11 EVIDENCE. LET ME SHOW YOU THOSE DOCUMENTS. AND YOU HEARD
12 THE TESTIMONY AND YOU HAVE SEEN THOSE EXHIBITS; IS THAT
13 CORRECT?

14 A YES.

15 Q AND HOW DO YOU RESPOND TO THAT?

16 A AS TO DEFENDANT'S EXHIBIT 6 FOR IDENTIFICATION, I CAN'T
17 MAKE A WHOLE LOT OF SENSE OF THIS. THEY SHOW ME AND MY AGE
18 AND I'M AN ANESTHESIOLOGIST. DR. EADY IS AN ORTHOPEDIC
19 SURGEON. HE IS NOT AN ANESTHESIOLOGIST, SO WE DON'T COMPARE.
20 I'M NOT SURE WHO DR. JACKSON OR DR. LEWIS IS. DR. MACFARLANE
21 IS A UROLOGIST AND DR. PALEPU IS A GENERAL SURGEON. SO THERE
22 ARE SO MANY -- AND I DON'T KNOW ANYTHING ABOUT THESE PEOPLE'S
23 ACHIEVEMENTS IN THEIR SPECIALTY OR THE LENGTH -- THE NUMBER
24 OF YEARS THAT THEY HAVE BEEN IN THEIR SPECIALTY OR THEIR
25 LENGTH OF TIME AT THE VA. I JUST DON'T -- I DON'T KNOW

1 ANYTHING, SO I CAN'T MAKE ANY KIND OF JUDGMENT UPON THIS
2 FORM.

3 Q AND DO YOU HAVE ANY INFORMATION ABOUT THE SERVICE LINES
4 THAT ANY OF THOSE DOCTORS WORK IN AND WHETHER THERE'S BEEN
5 ANY SHOWING OF SOME KIND OF A DISPARATE IMPACT BASED ON AGE?

6 A I DON'T KNOW ANYTHING ABOUT WHAT IS HAPPENING IN OTHER
7 SERVICE LINES OTHER THAN ANESTHESIA.

8 Q OKAY. NOW I WANT TO GO BACK VERY BRIEFLY, BUT I WANT TO
9 GO BACK TO WHAT YOU TESTIFIED TO ABOUT THE LONGEVITY ISSUE
10 AND YOUR PRIOR EXPERIENCE AT THE VA. AND YOU TESTIFIED ABOUT
11 YOUR FEELING OF UNFAIRNESS WITH RESPECT TO WHAT WAS HAPPENING
12 TO YOU ON THE MARKET PAY SIDE.

13 AND SO, I WANT YOU TO TELL ME WHY YOU BELIEVE YOU SHOULD
14 GET CREDIT FOR ESSENTIALLY YOUR LONGEVITY AT THE VA ON THE
15 MARKET PAY SIDE OF THE EQUATION UNDER THAT FACTOR THAT TALKS
16 ABOUT PRIOR VA EXPERIENCE.

17 MRS. BAILEY: OBJECTION. SPECULATION.

18 THE COURT: I'M GOING TO SET THE -- MR. IRVIN, CAN
19 YOU REPHRASE YOUR QUESTION?

20 MR. IRVIN: YES, MA'AM. I CAN.

21 BY MR. IRVIN:

22 Q DO YOU HAVE A PROBLEM WITH THE FACT THAT YOU ARE NOT
23 RECEIVING CREDIT FOR YOUR PRIOR VA EXPERIENCE IN THE MARKET
24 PAY SIDE?

25 A ABSOLUTELY.

1 Q WHAT IS THAT PROBLEM?

2 A I HAVE REVIEWED THE STATUTE IN WHICH CONGRESS CLEARLY
3 INDICATED THAT IN BOTH BASE PAY AND IN MARKET PAY THAT THE
4 INTENT OF CONGRESS WAS TO REWARD VA PHYSICIANS IN THEIR
5 DETERMINATION OF BASE PAY IN A FORM OF STEP INCREASES AND
6 THAT THEY INTENDED TO REWARD THE ANESTHES -- PHYSICIANS, VA
7 PHYSICIANS, IN THE FORM OF THEIR MARKET PAY BECAUSE CONGRESS
8 LISTED THAT ONE OF THE FACTORS THAT THE COMPENSATION PANELS
9 WERE TO CONSIDER WAS LENGTH OF VHA EXPERIENCE.

10 AND SO, IT'S MY FEELING THAT BOTH MY BASE PAY AND MY
11 MARKET PAY SHOULD BE HIGHER BASED UPON THAT CONGRESSIONAL
12 INTENT.

13 Q ALL RIGHT.

14 MR. IRVIN: YOUR HONOR, COULD YOU GIVE ME JUST A
15 MOMENT --

16 THE COURT: OKAY.

17 MR. IRVIN: -- AND LET ME COLLECT MY THOUGHTS WITH
18 MRS. FULMER AND SEE IF THERE'S ANYTHING FURTHER THAT WE NEED
19 TO TALK ABOUT?

20 BY MR. IRVIN:

21 Q DR. KENNEDY, I SHOWED YOU THE TWO DEFENDANT'S EXHIBITS
22 AND I ASKED YOU ABOUT EXHIBIT 6 WHICH IS JUST FOR
23 IDENTIFICATION, BUT I'D LIKE TO ASK YOU ABOUT EXHIBIT
24 NUMBER 5. WOULD YOU TAKE A MOMENT TO LOOK THAT OVER AND TELL
25 US WHAT YOU--

1 THE COURT: IS THAT PLAINTIFF'S OR DEFENDANT'S?

2 MR. IRVIN: I BEG YOUR PARDON. IT'S A DEFENDANT'S
3 EXHIBIT, YOUR HONOR.

4 THE COURT: AND WAS NUMBER 6 ADMITTED?

5 THE CLERK: JUST FOR ID ONLY.

6 THE COURT: JUST FOR ID PURPOSES? OKAY.

7 MRS. BAILEY: YOUR HONOR, WE MOVED THAT INTO
8 EVIDENCE.

9 THE COURT: I THOUGHT YOU MOVED IT INTO EVIDENCE.

10 THE CLERK: SHE SAID FOR ID ONLY.

11 THE COURT: BUT THEN LATER I THOUGHT SHE MOVED IT
12 IN.

13 THE CLERK: IT DOESN'T MATTER BECAUSE IT'S NOT A
14 JURY, SO YOU'RE GOING TO--

15 THE COURT: I THOUGHT SHE HAD MOVED IT IN.

16 MRS. BAILEY: I THOUGHT I DID. I DID --

17 THE COURT: OVER THE PLAINTIFF'S OBJECTION.

18 MRS. BAILEY: -- AT THE END OF THE TESTIMONY.

19 THE COURT: I WILL LET IT IN.

20 (WHEREUPON, DEFENSE EXHIBIT NO. 6 WAS ADMITTED INTO
21 EVIDENCE.)

22 THE COURT: ALL RIGHT.

23 BY MR. IRVIN:

24 Q NOW DR. KENNEDY, EXHIBIT NUMBER 5 I BELIEVE IS THAT LONG
25 LIST OF --

1 A YES.

2 Q -- VARIOUS PEOPLE. AND WHAT WAS YOUR REACTION TO THAT
3 WHEN YOU SAW THAT EXHIBIT COME INTO EVIDENCE? HOW IS IT
4 RELEVANT TO THIS INQUIRY?

5 A WELL, APPARENTLY THE ARGUMENT IS THAT WE NEED TO LOOK AT
6 MORE THAN JUST THE ANESTHESIA DEPARTMENT AND LOOK AT OTHER
7 DEPARTMENTS OR LOOK AT THE MEDICAL STAFF AS A WHOLE. AND I
8 DON'T SEE HOW THAT CAN BE DONE BECAUSE THERE ARE WAY -- JUST
9 WAY TOO MANY VARIABLES.

10 ANESTHESIA DEPARTMENT IS REALLY SOMEWHAT UNIQUE IN THE
11 UNIFORMITY OF THE PHYSICIANS IN THE ANESTHESIA DEPARTMENT.
12 THEIR DUTIES ARE VIRTUALLY THE SAME, THEIR BACKGROUNDS ARE
13 VERY SAME, SO IT'S POSSIBLE TO COMPARE APPLES TO APPLES IN
14 ANESTHESIA.

15 IT'S NOT POSSIBLE IN THIS -- LOOKING AT THESE OTHER
16 SERVICE LINES. IF YOU GO TO THE LAST PAGE OF THE EXHIBIT
17 LOOKING AT SURGICAL CARE, DR. BREW [PH] IS LISTED. HE'S A
18 UROLOGIST. DR. CHAIPIS IS A GENERAL SURGEON. DR. CHEUK IS A
19 UROLOGIST. DR. CHU IS AN ORTHOPEDIC SURGEON. DR. EADY IS AN
20 ORTHOPEDIC SURGEON. DR. FICHTNER IS A THORACIC SURGEON. DR.
21 FRIEDMAN IS A PLASTIC SURGEON. DR. JACKSON I AM NOT SURE.
22 DR. JORGENSEN IS PLASTIC SURGEON. DR. KERR IS A THORACIC
23 SURGEON. KOSLOW I DON'T RECALL. MACFARLANE IS A UROLOGIST.
24 MARKOWITZ IS A OPHTHALMOLOGIST. MCKEE IS ENT. NOTTINGHAM IS
25 GENERAL SURGERY. PALEPU IS GENERAL SURGERY. WELLS IS ENT.

1 AND ALL OF THESE HAVE -- ARE DIFFERENT SPECIALTIES WITH
2 DIFFERENT MARKETS APPLICABLE. AND EVEN WITHIN THE SAME
3 SUB-SPECIALTY THERE ARE SIGNIFICANT VARIABLES. FOR EXAMPLE,
4 I'VE KNOWN THREE ENT DOCTORS QUITE WELL AT THE VA. ONE OF
5 THEM DIDN'T EVEN -- DIDN'T GO TO THE O-R, HAD NOT BEEN IN THE
6 O-R IN YEARS, ONLY WORKED IN THE CLINIC, DID NOT OBVIOUSLY
7 TAKE CALL BECAUSE HE DIDN'T HAVE O-R PRIVILEGES, HE JUST DID
8 ENT IN THE CLINICS. ANOTHER OF THE ENT PHYSICIANS DIDN'T
9 HAVE A FULL-TIME CONTRACT WITH THE VA.

10 MRS. BAILEY: OBJECTION, YOUR HONOR, FOR RELEVANCE.

11 THE COURT: SUSTAINED.

12 BY MR. IRVIN:

13 Q RICK, HAVE YOU HAD, ALONG THE WAY OF YOUR EMPLOYMENT AT
14 THE VA AS YOU'VE DESCRIBED IT, HAVE YOU EVER CONSIDERED GOING
15 TO WORK IN THE PRIVATE SECTOR IN THE PRACTICE OF
16 ANESTHESIOLOGY?

17 A YES.

18 Q ALL RIGHT. AND WHAT DID YOU DO IN THAT RESPECT?

19 A AFTER I'D BEEN AT THE VA A NUMBER OF YEARS I BASICALLY
20 MADE INFORMAL INQUIRIES AT PEOPLE I KNEW AT THE COLUMBIA
21 GROUPS. YOU KNOW, JUST SORT OF CAST OUT INQUIRIES BECAUSE
22 MOST OF THESE PEOPLE I KNEW QUITE WELL. I HAD BEEN ACTIVE IN
23 THE ANESTHESIA DEPARTMENT. I KNEW THE ANESTHESIOLOGISTS IN
24 COLUMBIA. AND BASICALLY WAS GETTING OUT THE WORD IF YOU HAVE
25 AN OPENING, I WOULD REALLY BE INTERESTED IN COMING.

1 AND TIME WENT ON AND TIME WENT ON AND I JUST, I NEVER
2 HEARD OF ANYTHING, DIDN'T HEAR ANYTHING BACK, AND I WAS
3 SOMEWHAT PERPLEXED BECAUSE I KNEW I HAD SKILLS, I HAD A LOT
4 OF EXPERIENCE. AND ULTIMATELY IT WAS CLEAR THAT THE REASON
5 THAT THERE WAS NO INTEREST IN MY SERVICES WAS THAT BEING
6 OLDER --

7 MRS. BAILEY: OBJECTION.

8 A -- THEY WERE JUST -- THEY WEREN'T INTERESTED IN HIRING
9 OLDER PEOPLE.

10 MRS. BAILEY: OBJECTION.

11 THE COURT: SUSTAINED. I AM NOT SURE THE RELEVANCE
12 OF THAT TESTIMONY WITH REGARD TO --

13 MR. IRVIN: THERE WAS--

14 THE COURT: -- OTHER SERVICES WITH REGARD...

15 MR. IRVIN: THERE WAS TESTIMONY ABOUT HIRING IN THE
16 PRIVATE SECTOR. THEY PUT IN EVIDENCE ABOUT HIRING
17 ANESTHESIOLOGISTS OUT IN THE PRIVATE SECTOR, AND THAT'S WHAT
18 DR. KENNEDY WAS RESPONDING TO.

19 THE COURT: ALL RIGHT.

20 MR. IRVIN: WHAT HE HAD LEARNED ABOUT THAT AS HE
21 MADE INQUIRY.

22 THE COURT: OKAY.

23 BY MR. IRVIN:

24 Q AND THAT'S ALL THE QUESTIONS THAT I HAVE FOR YOU, DR.

25 KENNEDY, AND -- MRS. FULMER IS TELLING ME THAT I'M NOT. DR.

1 KENNEDY, YOU WILL RECALL THAT TAMARA NICHOLS TESTIFIED THAT
2 TAKING THE MARKET PAY AWARDED TO A RELATIVELY NEW SPECIALIST,
3 A RELATIVELY NEW ANESTHESIOLOGIST, AND THEN AWARDING THE SAME
4 MARKET PAY TO AN OLDER ANESTHESIOLOGIST SUCH AS YOURSELF
5 WOULD CAUSE THAT OLDER ANESTHESIOLOGIST TO GET PAID TOO MUCH.
6 WHY ISN'T SHE RIGHT ABOUT THAT?

7 A THERE'S NO REQUIREMENT AND I HAVE NEVER SEEN ANY KIND OF
8 REGULATION THAT ALL MEMBERS OF THE ANESTHESIA DEPARTMENT, WHO
9 WERE BASICALLY OTHERWISE EQUAL OTHER THAN LENGTH OF VA
10 SERVICE, ARE EXPECTED TO MAKE THE SAME AMOUNT.

11 MRS. BAILEY: OBJECTION. NO FOUNDATION FOR HIS
12 INTERPRETATION OF THE VA POLICIES.

13 MR. IRVIN: YOUR HONOR, HE'S WORKED THERE FOR 19
14 YEARS AND HE'S JUST TESTIFIED THAT HE RESEARCHED ALL OF THIS
15 AT LENGTH. I THINK HE CAN SPEAK FROM HIS OWN KNOWLEDGE.

16 THE COURT: I DON'T THINK HE CAN SPEAK TO THE VA
17 POLICY OR REPRESENTATIVE OF THE VA ON THE POLICY ISSUE.
18 BY MR. IRVIN:

19 Q CAN YOU NOT HAVE YOUR ANSWER ADDRESS THE POLICIES, BUT
20 IS THERE ANYTHING ELSE THAT YOU WOULD LIKE TO SAY?

21 A I DIDN'T SEE ANY PROBLEM WITH MY EARNING SIGNIFICANTLY
22 MORE THAN MY COLLEAGUES IN VIEW OF THE FACT THAT I HAD SUCH
23 SIGNIFICANT BUILT-UP SENIORITY WHICH ENTITLED ME TO MORE,
24 PARTICULARLY MORE BASE PAY FROM THE STATUTE AND FROM THE
25 CHARTS SHOWING WHAT THE BASE PAY IS AND WHAT THE STEP

1 INCREASES.

2 I WAS ALLOWED ON STEP NINE WHICH INCREASED MY BASE PAY
3 SOME OVER \$25,000 AND I WAS CERTAINLY ENTITLED TO THAT
4 \$25,000 MORE THAN MY COLLEAGUES. I DIDN'T SEE WHY I HAD TO
5 BE PAID THE EXACT SAME AMOUNT VIRTUALLY AS EVERYONE ELSE.

6 Q OKAY. NOW DR. KENNEDY, YOU HEARD JUST A LITTLE WHILE
7 AGO WITH MRS. DOTY'S TESTIMONY THAT THERE WAS SOME FIGURE ON
8 ANNUAL SALARY PUT UP OF \$427,000 OR SOME SUCH. YOU'RE NOT
9 ASKING FOR ANYTHING LIKE THAT; ARE YOU?

10 A OH NO.

11 Q ALL RIGHT, SIR. AND IS -- AND TO THE BEST OF YOUR
12 UNDERSTANDING IF THE COURT WERE TO DIRECT THAT YOUR SALARY BE
13 ADJUSTED AS YOU HAVE EXPLAINED IN EXHIBITS 18 AND I GUESS IN
14 20 AS WELL, BUT IF YOUR SALARY WAS ADJUSTED IN ACCORDANCE
15 WITH EXHIBIT NUMBER 18, WOULD YOU GO OVER ANY OF THESE
16 MAXIMUMS THAT ARE SET BY THESE GOVERNMENT TABLES IN TERMS OF
17 YOUR SALARY?

18 A I'M NOT SURE. THERE -- THERE ARE REALLY TWO MAXIMUMS
19 THAT HAVE BEEN DISCUSSED HERE, AND I'M GOING TO TRY TO SORT
20 OF SORT THIS OUT. THERE'S THESE PAY RANGES THAT WE TALKED
21 ABOUT THAT MAY CHANGE FROM YEAR TO YEAR. AND THESE PAY
22 RANGES AS -- FROM MY UNDERSTANDING IS NOT NECESSARILY A
23 MAXIMUM. BUT WHAT YOU GET IN -- WHAT I'M FOCUSING ON IS THE
24 EXCEPTIONS THAT THE FACILITY DIRECTOR COULD GIVE VERSUS IN
25 THE VISN DIRECTOR.

1 THROUGHOUT ALL OF THE DOCUMENTS THAT I OBTAINED THROUGH
2 FOIA THERE WERE DOCUMENT AFTER DOCUMENT AFTER DOCUMENT AFTER
3 DOCUMENT WHERE THE ANESTHESIOLOGISTS IN TOTAL SALARIES, MINE,
4 ALL OF MY COLLEAGUES EXCEEDED THE MAXIMUM AT THE FACILITY
5 LEVEL AT DORN. WITHOUT EXCEPTION THE FACILITY -- THE
6 FACILITY DIRECTOR SENT THOSE SALARIES ON UP TO --

7 THE COURT: CONTINUE.

8 A -- WITHOUT EXCEPTION THE FACILITY DIRECTOR FROM THOSE
9 DOCUMENTS SENT THOSE SALARIES ON UP TO THE VISN LEVEL TO ASK
10 THAT THE EXCEPTION BE APPROVED. AND IN NO SITUATION WAS ANY
11 OF THOSE ANESTHESIA SALARIES, WHICH INVOLVED EVERYBODY IN THE
12 DEPARTMENT, IS -- NO TIME DID THE VISN REFUSE TO ACCEPT THOSE
13 EXCEPTIONS.

14 SO IT WAS MYSELF, IT WAS ALL THE OTHER MEMBERS OF THE
15 DEPARTMENT HAVE THEIR SALARIES THAT EXCEEDED THE FACILITY
16 MAXIMUM APPROVED UP TO THE VISN MAXIMUM, AND AT NO TIME WOULD
17 MY SALARY OR ANY OF MY COLLEAGUES' SALARY EVER HAVE EXCEEDED
18 THE FACILITY, THE VISN, MAXIMUM, SO IT HAD TO GO UP TO THE
19 UNDERSECRETARY.

20 Q OKAY. DR. KENNEDY, YOU HAVE SEEN THE TYPED-UP SHEETS
21 THAT WE TALKED A LOT ABOUT WITH THE FACTORS ONE THROUGH SEVEN
22 ON THEM?

23 A YES, I HAVE.

24 Q AND IN EVIDENCE WE HAVE THE -- THE SHEETS FOR THE MAY
25 2015 REVIEWS AND THEN WE HAVE THE SHEETS FOR THE

1 NOVEMBER 2016 REVIEWS; IS THAT CORRECT?

2 A YES.

3 Q YOU SEEN THOSE AND YOU REVIEWED THOSE.

4 A I HAVE.

5 Q ARE THEY IDENTICAL?

6 A THEY ARE IDENTICAL. THE ONES THAT WERE PREPARED IN --
7 FOR THE MAY 1, 2015 COMPENSATION PANEL AND THE ONES PREPARED
8 FOR THE NOVEMBER 10, 2016 PANEL ARE THE SAME DOWN TO THE
9 CUT-AND-PASTE MISTAKE OF PUTTING MY NAME ON ALGHOTHANI'S
10 LIST, NARRATIVE LIST OF FACTORS. AND EVEN THE LENGTH OF VA
11 SERVICE IS LISTED AS THE SAME ON THE TWO NARRATIVES EVEN
12 THOUGH THERE WAS A YEAR -- LIKE A YEAR AND A HALF DIFFERENCE
13 BETWEEN THE TWO COMPENSATION PANELS.

14 Q THANK YOU, DR. KENNEDY. ANSWER ANY QUESTIONS
15 MRS. BAILEY MAY HAVE.

16 CROSS-EXAMINATION

17 BY MRS. BAILEY:

18 Q WELL DR. KENNEDY, IT'S BEEN A LONG TWO DAYS; HASN'T IT?

19 A IT HAS.

20 Q BUT YOU AND I, WE'RE UP HERE AT THE VERY LAST.

21 A YES.

22 Q AS I UNDERSTAND FROM YOUR ARGUMENT THAT YOU PRESENTED
23 OVER THE LAST DAY OR YOUR LAWYER HAS PRESENTED, IT'S YOUR
24 POSITION THAT YOUR DISPARATE TREATMENT CLAIM IS LIMITED TO
25 THE COHORT OF FIVE ANESTHESIOLOGISTS AT THE--

1 THE COURT: LET ME STOP YOU. DISPARATE TREATMENT
2 OR DISPARATE IMPACT?

3 MRS. BAILEY: OH, THANK YOU.

4 BY MRS. BAILEY:

5 Q IT'S MY UNDERSTANDING THAT YOUR DISPARATE IMPACT CLAIM
6 IS LIMITED TO THE FIVE ANESTHESIOLOGISTS WORKING AT THE DORN
7 VA; IS THAT CORRECT?

8 A PRECISELY.

9 Q YOU PERSONALLY HAVE NO INTEREST IN WHAT'S GOING ON WITH
10 THE OTHER OLDER DOCTORS OR THE MORE EXPERIENCED DOCTORS -- TO
11 USE THE HUMAN RESOURCES WORD FOR IT -- AT THE DORN VA.

12 A I HAVE NO WAY OF LOOKING AT THE VARIABLES OR FACTORS
13 CONCERNING PEOPLE OUTSIDE OF ANESTHESIA.

14 Q AND YOU'RE NOT INTERESTED IN WHAT HAPPENS WITH THE
15 ANESTHESIOLOGISTS AT ANY OF THE OTHER VA FACILITIES AROUND
16 THE COUNTRY.

17 A I DON'T KNOW ANYTHING ABOUT THE ANESTHESIA FACILITIES,
18 OTHER PARTS OF THE COUNTRY, SO THERE'S -- THERE'S NO WAY I
19 COULD EXPRESS ANY OPINION ABOUT WHAT'S GOING ON THERE.

20 Q BECAUSE YOU HAVE LIMITED YOUR CASE, YOUR DISPARATE
21 IMPACT CASE, TO A COHORT OF FIVE.

22 A I HAVE.

23 Q I'D LIKE TO TURN YOUR ATTENTION TO YOUR EXHIBIT,
24 PLAINTIFF'S EXHIBIT NUMBER 15 THAT WE WERE ACTUALLY JUST
25 TALKING ABOUT. AND I SEE FROM HERE, AND I THINK YOU WILL

1 AGREE WITH ME -- IT'S WHAT WE HAVE BEEN TALKING ABOUT -- THAT
2 YOU ARE THE OLDEST OF THE, WHAT, FIVE ANESTHESIOLOGISTS.

3 A CORRECT.

4 Q AND IF YOU GO OVER TO THE ANNUAL PAY COLUMN, YOU ALSO
5 HAVE THE HIGHEST PAY OF THE FIVE ANESTHESIOLOGISTS.

6 A BY A SMALL AMOUNT.

7 Q BUT IT IS THE HIGHEST PAID.

8 A IT IS.

9 Q WHAT'S THE DIFFERENCE BETWEEN YOU AND PRYOR IS, WHAT,
10 \$4,000? YOU AND PENDER, LITTLE BIT MORE, LITTLE BIT LESS
11 THAN THAT?

12 A YES. IT'S PRETTY CLEAR THAT THE ANNUAL PAY IS PRETTY
13 CLOSE, AND THAT'S PART -- THAT'S CONSISTENT WITH MY POSITION
14 THAT THE VA HAS BEEN TRYING TO ESSENTIALLY KEEP TOTAL PAY OF
15 ANESTHESIOLOGISTS ESSENTIALLY EQUAL. AND IN NOVEMBER THEY
16 FINALLY JUST MADE IT QUITE CLEAR IT WAS GOING TO BE EXACTLY
17 EQUAL.

18 Q WELL, LET ME ASK YOU ABOUT THE SECOND COLUMN WHERE THE
19 LENGTH OF SERVICE IN THE SPECIALTY IN VHA.

20 A YES.

21 Q YOU SAY YOU'VE GOT 35. WHAT DOES THAT 35 REPRESENT?

22 A THAT'S A COMBINATION OF THE LENGTH OF TIME I HAVE BEEN
23 AN ANESTHESIOLOGIST AND THE LENGTH OF TIME I HAVE BEEN AT THE
24 VA.

25 Q SO, HOW MANY YEARS HAVE YOU BEEN AN ANESTHESIOLOGIST?

1 A THREE MORE YEARS THAN I'VE BEEN AT THE VA.

2 Q SO WHAT IS -- CAN YOU FIGURE THAT OUT FOR ME WITH THESE
3 NUMBERS?

4 A LET'S SEE. I DON'T KNOW WHEN THIS CHART WAS PREPARED.
5 I DIDN'T PREPARE IT. SO LET'S SEE. AT AGE 63 -- LET ME
6 THINK. THAT WAS IN -- THAT WAS IN '14. SO, AT THAT TIME I
7 HAD BEEN AT THE VA FOR 16 YEARS AND I HAD BEEN AN
8 ANESTHESIOLOGIST FOR 19 YEARS. THAT'S 35.

9 Q OKAY. SO THAT'S WHERE THAT NUMBER COMES --

10 A THAT'S CORRECT.

11 Q -- IS FROM SOME -- YOU HAVE BEEN AN ANESTHESIOLOGIST 19
12 YEARS.

13 A YES.

14 Q AND FOR 16 OF THOSE 19 YEARS YOU HAVE BEEN AN
15 ANESTHESIOLOGIST AT THE VA.

16 A YES.

17 Q SO THIS NUMBER YOU'RE -- KIND OF DOUBLE-COUNTS YOUR
18 YEARS AS AN ANESTHESIOLOGIST.

19 A ABSOLUTELY NOT.

20 Q OKAY. SO YOU GOT 19. WHEN DID YOU FIRST BECOME AN
21 ANESTHESIOLOGIST?

22 A IN 1995.

23 Q OKAY. SO YOU WERE -- AND WHEN DID YOU COME WITH THE VA?

24 A IN 1998.

25 Q OKAY. SO FROM 1995 TO 1998, THAT'S THREE YEARS.

1 A YES.

2 Q AND THEN 1998 YOU HAD ONE YEAR OF ANESTHESIOLOGY SERVICE
3 AND ONE YEAR AT THE VA.

4 A IN 1998 I CAME TO THE VA. I HAD THREE YEARS OF
5 ANESTHESIA EXPERIENCE AND AT THAT TIME I HAD NO YEARS OF
6 EXPERIENCE AS AN ATTENDING ANESTHESIOLOGIST. I ONLY HAD
7 EXPERIENCE AS A RESIDENT AND A MEDICAL STUDENT.

8 Q SO WE ARE TALKING ABOUT THE 16 YEARS WITH THE VA ON THIS
9 CHART?

10 A YES.

11 Q IS THAT COUNTING YOUR TERM AS A RESIDENT?

12 A NO.

13 Q OKAY. SO HOW ABOUT THE FOLLOWING YEAR?

14 A WHAT DO YOU MEAN FOLLOWING YEAR?

15 Q 1999.

16 A 1999 I HAD FOUR YEARS OF ANESTHESIA EXPERIENCE AND ONE
17 YEAR OF VA EXPERIENCE.

18 Q OKAY. BUT THAT WAS REALLY -- THAT ONE YEAR OF VA WAS
19 INCORPORATED INTO THE FOUR YEARS OF ANESTHESIOLOGY
20 EXPERIENCE.

21 A NO.

22 Q OH.

23 A I HAD ONE YEAR OF ANESTHESIA -- I HAD FOUR YEARS OF
24 ANESTHESIA EXPERIENCE AND I HAD ONE YEAR OF VA EXPERIENCE.
25 THE SECOND --

1 Q SO THE VA EXPERIENCE--

2 A -- THEY HAPPENED AT THE SAME TIME ARE IMMATERIAL.

3 Q WAS THE VA EXPERIENCE IN ANESTHESIOLOGY?

4 A YES.

5 Q OKAY. SO YOU DIDN'T COUNT THAT YEAR AS PART OF YOUR
6 FOUR YEARS OF ANESTHESIOLOGY EXPERIENCE?

7 A YES, I COUNTED THAT AS PART OF MY FOUR YEARS OF--

8 Q OKAY. SO THAT ONE YEAR IS COUNTED TWICE.

9 A NO.

10 Q OKAY. HOW ABOUT LET'S GO TO THE NEXT YEAR WHICH WOULD
11 BE LIKE, WHAT, 2000.

12 A OKAY.

13 Q AND THAT -- BY THAT TIME YOU HAD HAD FIVE YEARS TOTAL OF
14 ANESTHESIOLOGY EXPERIENCE?

15 A YES.

16 Q AND TWO OF THOSE FIVE YEARS HAD BEEN AT THE VA?

17 A YES.

18 Q OKAY. SO THAT WOULD HAVE BEEN FIVE YEARS TOTAL WITH A
19 SUB-NUMBER OF TWO AT THE VA; IS THAT RIGHT?

20 A I DON'T ACCEPT YOUR SUB-NUMBER.

21 Q OKAY. YOU DON'T -- YOU DON'T COUNT ONE YEAR OF
22 ANESTHESIOLOGY AND ONE YEAR OF ANESTHESIOLOGY AT THE VA IN
23 1995 AS THE SAME CALENDAR YEAR?

24 A YES, IT'S THE SAME CALENDAR YEAR BUT DOESN'T MEAN THAT
25 MY ANESTHESIA EXPERIENCE IS ANY LESS BECAUSE IT WAS THE VA

1 NOR IS MY VA EXPERIENCE ANY LESS BECAUSE I PRACTICED
2 ANESTHESIA DURING THAT TIME.

3 Q ALL RIGHT. WELL THAT'S -- I'M A LITTLE BIT AT A LOSS AS
4 TO WHY YOU NEED TO DOUBLE-COUNT IT --

5 A I AM NOT DOUBLE-COUNTING.

6 Q -- THESE YEARS. LET'S JUST FOR FUNSIES ASK YOU HOW MANY
7 YEARS OF VA SERVICE HAVE YOU HAD ACCORDING TO THIS CHART IN
8 DECEMBER 14?

9 A SIXTEEN.

10 Q OKAY. I WISH -- CAN YOU -- I KNOW YOU CAN'T WRITE ON
11 THIS CHART, BUT THAT WOULD BE A 16 FOR THE VA AND YOU HAD AT
12 THE -- SOMEWHAT OVERLAPPING, WHAT, 19 YEARS TOTAL?

13 A I'M NOT GOING TO ACCEPT YOUR OVERLAPPING ARGUMENT. I'M
14 SORRY, MRS. BAILEY. I HAVE -- DURING -- THAT 35 NUMBER
15 REFLECTS 16 YEARS AT THE VA AND 19 YEARS IN ANESTHESIA.

16 Q AND THE FACT THAT THEY WERE THE SAME YEARS MEANS NOTHING
17 TO YOU?

18 A ABSOLUTELY NOTHING.

19 Q AND I GUESS YOU'VE GONE AHEAD AND THROUGH ALL OF THESE
20 DOUBLE-ADDED THE YEARS ANESTHESIOLOGY WITH THE YEARS AT THE
21 VA?

22 A AGAIN, I'M NOT GOING TO ACCEPT YOUR REPRESENTATION OF
23 DOUBLE-ADDING. THE SAME APPROACH WAS USED FOR EVERY OTHER
24 ANESTHESIOLOGIST ON THIS CHART WHERE THEIR TIME IN ANESTHESIA
25 AND THEIR TIME AT THE VA WERE ADDED TOGETHER TO COME UP WITH

1 SORT OF A TOTAL TO LOOK AT AS FAR AS COMPARING THEIR MARKET
2 PAY AWARDS.

3 Q OKAY. JUST TELL ME, IN DECEMBER OF 2014 HOW MANY YEARS
4 HAD PRYOR HAD AT THE VA?

5 A I DON'T HAVE HIS RECORDS IN FRONT OF ME, SO I CAN'T TELL
6 YOU.

7 Q YOU DON'T KNOW THAT?

8 A BY MEMORY, NO.

9 Q YOU DON'T REMEMBER--

10 A I DID -- I DID NOT PREPARE THIS CHART.

11 Q WELL, IT'S IN EVIDENCE AND YOU HAVE BEEN TESTIFYING
12 ABOUT IT. BUT YOU DON'T KNOW WHEN PRYOR CAME TO THE VA?

13 A YES, I KNOW WHEN PRYOR CAME TO THE VA. HE CAME IN 2005,
14 SO LET'S SEE, AS OF -- I MAY BE ABLE TO COME UP WITH PRYOR'S
15 NUMBERS. PRYOR HAD SIX MONTHS LESS ANESTHESIA EXPERIENCE
16 THAN I BECAUSE WE WERE IN THE SAME RESIDENCY PROGRAM TOGETHER
17 AND HE FINISHED SIX MONTHS AFTER ME, SO THAT MEANS HE HAS SIX
18 MONTHS LESS ANESTHESIA EXPERIENCE.

19 I HIRED DR. PRYOR AT THE VA IN 2005 AND I HAD BEEN -- I
20 CAME IN 1998, SO THAT MEANS DR. PRYOR HAD SEVEN YEARS OF VA
21 EXPERIENCE. SO LET'S SEE. I HAD -- SO DR. PRYOR HAD ABOUT
22 15 OR 16 YEARS OF ANESTHESIA EXPERIENCE. LET'S USE 16. AND
23 VA EXPERIENCE WAS '05. LET'S SEE, WANT TO BACK IN THESE
24 EXHIBITS I -- TO CALCULATE...

25 Q BUT THE POINT I WAS TRYING TO MAKE IS THAT YOU AND PRYOR

1 FINISHED A RESIDENCY AT ABOUT THE SAME TIME?

2 A WITHIN SIX MONTHS OF EACH OTHER, YES.

3 Q AND HE CAME TO THE VA ABOUT FIVE YEARS AFTER YOU?

4 A SEVEN YEARS AFTER ME.

5 Q AND HIS EXPERIENCE AS A DOCTOR WAS PRETTY CLOSE TO
6 YOURS?

7 A YES, I WOULD SAY SO.

8 Q AND RATHER THAN--

9 A AS A MATTER OF FACT, THAT SEVEN YEARS HE JUST TAUGHT --
10 THAT 28 PLUS SEVEN IS 35, SO THAT GETS...

11 Q OKAY. THANK YOU. AND THEN JUST RATHER THAN GO THROUGH
12 THIS IN ALL THESE, BECAUSE THAT'S JUST OBVIOUSLY GOING TO BE
13 DIFFICULT, I WANT TO LOOK AT THESE FIGURES OF THE ANNUAL PAY
14 THAT IS MARKET PAY.

15 A OKAY.

16 Q NOW, ARE YOU TELLING ME THAT YOU DID NOT CALCULATE THESE
17 FIGURES?

18 A I DID NOT PREPARE THIS CHART.

19 Q DID YOU CALCULATE THESE FIGURES?

20 A THESE FIGURES CAME OFF OF DOCUMENTS THROUGH DISCOVERY.
21 I DON'T KNOW ABOUT CALCULATING THE FIGURES. THE -- THESE
22 NUMBERS CAME FROM DOCUMENTS PRODUCED DURING DISCOVERY.

23 Q THE PERCENTAGE OF ANNUAL PAY, THAT 57.2 PERCENT, WAS
24 PRODUCED TO YOU DURING DISCOVERY, SIR?

25 A I DIDN'T CALCULATE THESE PERCENTAGES. THESE PERCENTAGES

1 WERE PREPARED BY MY COUNSEL.

2 Q OKAY.

3 MR. IRVIN: YOUR HONOR, PLEASE. IF I CAN MAYBE
4 ASSIST. THIS IS A DOCUMENT, AS THE WITNESS HAS SAID THREE
5 TIMES, HE DIDN'T PREPARE. MRS. FULMER PREPARED THIS DOCUMENT
6 AND IT WAS SUBMITTED TO THE COURT ON OUR SUMMARY JUDGMENT
7 MOTION. SO I JUST DON'T KNOW HOW MUCH MORE DR. KENNEDY CAN
8 SAY. HE DIDN'T DO THE CALCULATIONS. HE DIDN'T PREPARE THE
9 DOCUMENT. WE CAN CONTINUE ON WITH THIS IF YOU WANT, BUT...

10 MRS. BAILEY: NO.

11 BY MRS. BAILEY:

12 Q BUT DR. KENNEDY, SINCE YOUR COUNSEL PREPARED THIS
13 DOCUMENT, YOU OBVIOUSLY DON'T HAVE ANY QUARREL WITH THE
14 FIGURES?

15 A I HAVEN'T CHECKED THE FIGURES. I -- I DON'T HAVE ANY
16 QUARREL WITH THEM. I DON'T -- LIKE I SAY, I HAVEN'T DONE
17 THESE CALCULATIONS. I DON'T -- I ASSUME THEY ARE CORRECT,
18 BUT I -- I DON'T KNOW.

19 Q OKAY. I'D LIKE FOR YOU TO LOOK AT DEFENDANT'S EXHIBIT
20 NUMBER 6.

21 A DON'T SEEM TO HAVE IT.

22 Q CAN YOU LOOK ON THE VIDEO ON THE SCREEN?

23 A WHAT'S ON MY SCREEN IS THE CHART THAT -- OH, OKAY. I'M
24 WITH YOU. I THOUGHT THAT WAS THE PREVIOUS CHART WE WERE
25 TALKING ABOUT. THIS IS THE CHART WITH DR. EADY ON IT. OKAY.

1 VERY GOOD. LOOKING AT IT.

2 Q AND AGAIN, I GUESS YOU HAVE NOT CHECKED ANY OF THESE
3 FIGURES?

4 A NO, I HAVE NOT.

5 Q DO YOU HAVE ANY REASON TO SUSPECT THAT ANY OF THEM ARE
6 NOT CORRECT?

7 A I DON'T KNOW ANYTHING ABOUT THESE FIGURES. I HAVE NO
8 REASON TO SUSPECT THEY ARE CORRECT OR INCORRECT.

9 Q I'D LIKE FOR YOU, IF YOU JUST WOULDN'T MIND, TO TAKE A
10 LOOK AT DEFENDANT'S EXHIBIT NUMBER 5, THE VERY LAST PAGE.
11 THAT WOULD BE RFP6.

12 A OKAY.

13 Q GET IT UP THERE. AND I'D LIKE FOR YOU TO LOOK WHERE IT
14 SAYS -- ON THE LEFT-HAND COLUMN.

15 A YES.

16 Q DO YOU HAVE IT UP?

17 A SAYS SURGICAL CARE.

18 Q THAT'S RIGHT.

19 A SPECIALTY CARE, PATIENT SERVICE LINE, AND THEN SURGICAL
20 CARE.

21 Q AND THEN FROM THE -- AFTER THE TOP THREE, THE REST OF
22 THEM ARE ALL SURGICAL CARE; AREN'T THEY?

23 A YES.

24 Q OKAY. AND I WANT YOU TO LOOK AND SEE IF YOU CAN FIND
25 DR. EADY'S NAME ON THAT CHART.

1 A YES.

2 Q AND WHAT IS HIS SALARY?

3 A HIS SALARY ON THE LISTING IS 113,285.

4 Q AND HIS MARKET PAY.

5 A 251,136.

6 Q AND HIS TOTAL PAY?

7 A 364,421.

8 Q AND WHAT WAS HIS DATE OF BIRTH?

9 A *****, **, '41.

10 Q WELL, LET'S SEE IF WE CAN LOOK BACK OUT TO THE
11 GOVERNMENT'S EXHIBIT NUMBER 5. SEE IF THOSE ARE THE SAME
12 NUMBERS OVER THERE.

13 A THIS IS -- YOU TALKING ABOUT NUMBER 6, I BELIEVE, NOT...
14 NUMBER FIVE IS WHAT WE WERE JUST DISCUSSING YOU SAID NOW.

15 Q NUMBER 6.

16 A NUMBER 6? OKAY. I'M LOOKING AT NUMBER 6.

17 Q WERE ANY OF THOSE THE SAME NUMBERS YOU JUST READ OUT?

18 A I HAVE TO LOOK AT IT. LET ME SEE. OKAY. IT SAYS BASE
19 PAY HERE AND IT SAYS SALARY HERE, 113,285. MARKET PAY
20 251,136. ANNUAL PAY 364,421. APPEARS TO BE CONSISTENT.

21 Q OKAY. RATHER THAN GO THROUGH THAT WITH ALL THE DOCTORS
22 --

23 A YES.

24 Q -- I WOULD LIKE FOR YOU TO LOOK FOR YOURSELF AND SEE IF
25 YOU CAN FIND DR. JACKSON UNDERNEATH -- ON THE SURGICAL CARE

1 LIST ON EXHIBIT NUMBER 5.

2 A OKAY.

3 Q AND JUST TO HELP YOU, HE'S FOUR DOWN FROM DR. EADY.

4 A DR. JOSEPH JACKSON. OKAY.

5 Q AND SEE THAT HE'S IN THE SURGICAL CARE DEPARTMENT?

6 A IT SAYS SO.

7 Q AND HIS BIRTH DATE WAS 1945?

8 A YES.

9 Q AND THESE OTHER NUMBERS ARE PRETTY MUCH WHAT YOU'RE
10 FAMILIAR WITH?

11 A I AM NOT FAMILIAR WITH THESE NUMBERS AT ALL.

12 Q OKAY. WELL, LET'S GO ON DOWN FIVE MORE LINES TO DR.
13 LEWIS.

14 A OKAY.

15 Q AND YOU SEE HERE ON THE -- ON THE CHART, WHICH IS THE
16 DEFENDANT'S EXHIBIT NUMBER 5 --

17 A YES.

18 Q -- LEWIS' SALARY WAS 103?

19 A YES.

20 Q MARKET PAY ROUGHLY 152?

21 A YES.

22 Q TOTAL PAY 255?

23 A YES.

24 Q AND HE WAS BORN IN 1944?

25 A THAT'S ALL TRUE, BUT I DON'T KNOW WHAT -- I DON'T --

1 NEVER SEEN DR. LEWIS, DON'T KNOW WHETHER HE'S -- WORKS IN THE
2 OPERATING ROOM OR JUST IN CLINICS. I DON'T KNOW ANYTHING
3 ABOUT HIM. I CAN'T MAKE--

4 Q WE ARE JUST -- THIS IS A DISPARATE TREATMENT AGE CASE.
5 WE ARE JUST LOOKING AT AGE, MARKET PAY --

6 A DISPARATE IMPACT.

7 Q -- AND BASE PAY FOR MY PURPOSES. AND I'M SURE YOUR
8 LAWYER --

9 A DISPARATE IMPACT.

10 Q -- ASK YOU MORE STUFF. OKAY. LET'S GO DOWN ONE MORE TO
11 MR -- DR. MACFARLANE.

12 A YES.

13 Q HE IS A LITTLE BIT OLDER THAN THE OTHER ONES, LITTLE BIT
14 YOUNGER--

15 A YOUNGER THAN I.

16 Q YEAH. HE'S ONLY BEEN IN THE VA LESS THAN EIGHT YEARS.

17 A YES.

18 Q AND AGAIN, HIS BASE PAY, MARKET PAY...

19 A I DON'T KNOW HOW LONG HE HAS BEEN THERE. I DON'T KNOW
20 THAT THAT'S ON THIS -- OH, ON THIS CHART. SORRY. LET'S SEE.
21 LENGTH OF VHA SERVICE. MACFARLANE. LESS THAN OR EQUAL TO
22 EIGHT. OKAY.

23 Q AND THEN THE VERY BOTTOM ONE IS PALEPU; RIGHT?

24 A YES. UH-HUH.

25 Q AND AGAIN, HIS SALARY WHICH, YOU KNOW, WE'VE GOT EARLIER

1 TESTIMONY THAT THAT IS HIS SCHEDULE PAY BASED ON LONGEVITY IS
2 99,000.

3 A YES.

4 Q HIS MARKET PAY 196.

5 A YES.

6 Q HIS TOTAL PAY IS 295.

7 A YES.

8 Q AND OF COURSE HIS DATE OF BIRTH WAS SEVEN YEARS BEFORE
9 YOU.

10 A OKAY.

11 Q THAT'S RIGHT?

12 A LET'S SEE. YES.

13 Q SO THESE ARE FIVE DOCTORS IN THE SURGICAL CARE LINE THAT
14 WERE OLDER THAN YOU WITH A HIGHER PERCENTAGE OF ANNUAL PAY TO
15 MARKET PAY GOING BY THIS CHART.

16 A IF YOU SAY SO.

17 Q OKAY. I'D LIKE FOR YOU AT THIS POINT MOVE ON A
18 DIFFERENT TOPIC. LET'S LOOK AT EXHIBIT NUMBER 12.

19 THE COURT: PLAINTIFF OR DEFENDANT? PLAINTIFF OR
20 DEFENDANT?

21 MRS. BAILEY: PLAINTIFF'S EXHIBIT NUMBER 12.

22 A ON THE SCREEN. ALL RIGHT.

23 Q NOW, YOU RECOGNIZE THIS DOCUMENT?

24 A I DO.

25 Q OKAY. NOW IN THIS CASE -- LET'S SEE -- WANT YOU TO GO

1 TO PAGE 104. AND YOU SEE, DR. KENNEDY, THAT THIS IS YOUR
2 COMPENSATION PANEL REVIEW --

3 A YES.

4 Q -- FROM NOVEMBER 2016.

5 A YES.

6 Q AND OF COURSE THAT'S THE -- WHERE IT SAYS, OTHER, THAT
7 WAS A REVIEW WHEN ONE OF THE DOCTORS CAME IN WITH A OFFER OF
8 \$300,000 TO LEAVE THE VA.

9 A THAT'S WHAT THE TESTIMONY WAS.

10 Q YOU HAVE ANY REASON TO DOUBT THAT?

11 A NO.

12 Q OKAY. NOW LET'S -- SO THE DOCTOR WAS OFFERED 3,000 --
13 \$300,000 TO WORK IN THE COLUMBIA AREA. WOULDN'T THAT BE
14 REPRESENTATIVE OF THE MARKET PAY IN COLUMBIA?

15 A MY KNOWLEDGE OF THE MARKET PAY IN COLUMBIA IS ABOUT
16 400,000 FROM MY CONTACTS, MY EXTENSIVE CONTACTS WITH
17 ANESTHESIOLOGISTS IN THE COLUMBIA AREA. THE STARTING PAY FOR
18 SOMEONE WHO IS NOT YET A PARTNER MIGHT BE 400 -- MIGHT BE
19 300, BUT MOST ANESTHESIOLOGISTS IN COLUMBIA ARE MAKING 400
20 PLUS.

21 Q BUT FOR A DOCTOR LEAVING THE VA, HIS MARKET WORTH IN THE
22 COLUMBIA COMMUNITY IS GOING TO BE \$300,000; ISN'T IT?

23 A I DON'T KNOW. MAYBE INITIALLY.

24 Q OKAY. LET'S JUST SAY INITIALLY. THAT WOULD BE IT?

25 A UH-HUH.

1 Q NOW GO ON TO THE NEXT PAGE IF YOU DON'T MIND, WHICH
2 WOULD BE PAGE 105. PAGE 105. AND GO DOWN JUST A LITTLE BIT
3 MORE. RIGHT THERE. THE ANNUAL RATE OF PAY.

4 A YEAH.

5 Q HE'S GOT -- THIS IS FOR YOU.

6 A YES.

7 Q THE BASE PAY WAS 131. YOU DON'T HAVE ANY QUARREL WITH
8 THAT; DO YOU?

9 A NO.

10 Q AND THE MARKET PAY IS 168 ON THIS CHART. HOW MUCH DO
11 YOU THINK THAT MARKET PAY SHOULD HAVE BEEN?

12 A IT SHOULD HAVE BEEN NO LESS THAN THE HIGHEST MARKET PAY
13 OF ANY OF THE OTHER PEOPLE WHO WERE REVIEWED ON THAT SAME DAY
14 BY THAT SAME PANEL.

15 Q WELL, WHAT IS MARKET PAY?

16 A MARKET PAY IS A SUPPLEMENT CREATED BY CONGRESS TO BRING
17 A VA PHYSICIAN'S PAY UP TO A COMPETITIVE LEVEL. IT IS NOT AS
18 A SEPARATE ENTITY IN ITSELF WHAT THE SALARY IS. IT IS
19 DESIGNED AS A SUPPLEMENT.

20 SO THAT WHAT -- THE WAY IT SHOULD BE -- HAPPEN IS THAT
21 WHEN A COMPENSATION PANEL IS REVIEWING A PHYSICIAN, THEY
22 SHOULD -- THEY SHOULD OBVIOUSLY LOOK AT WHAT THE TOTAL
23 COMPENSATION WILL BE AND IT'S NOT INAPPROPRIATE FOR THEM TO
24 LOOK AT THE -- AT THE PHYSICIAN'S BASE PAY, SEE WHAT TYPE OF
25 SUPPLEMENT IT WOULD TAKE TO BRING THEM COMPETITIVE. AND ONCE

1 THAT SUPPLEMENT HAS BEEN DETERMINED, THAT IS THE SUPPLEMENT
2 THAT IS APPROPRIATE FOR ANYBODY WHO HAS THOSE SIMILAR
3 QUALIFICATIONS.

4 Q THAT'S EXACTLY WHAT THE VA HAS DONE.

5 A ABSOLUTELY NOT.

6 Q ALL RIGHT.

7 A THE VA HAS DONE--

8 Q HOLD ON. LET ME ASK YOU ANOTHER QUESTION.

9 A OKAY.

10 Q MRS. WOODS, WOULD YOU GO ON TO THE NEXT PAGE? ONE MORE
11 OVER. THIS IS THAT SURVEY DATA FROM THE HAY SURVEY --

12 A OKAY.

13 Q -- WHICH SAYS THAT THE RANGE OF MARKET PAY FOR AN
14 ANESTHESIOLOGIST -- WHAT IS THIS?

15 A WHAT IS THIS? I CAN'T READ IT VERY WELL. IT'S...

16 Q HOW ABOUT THAT? SHE BROUGHT IT OUT FOR YOU.

17 A I SEE ANESTHESIOLOGY THREE TIMES WITH THREE DIFFERENT
18 NUMBERS, HIGH LOW, TENTH PERCENTILE, 50TH PERCENTILE.
19 THEY'RE DIFFERENT NUMBERS. WHAT IS YOUR QUESTION?

20 Q WHAT WOULD BE THE MARKET PAY OF A ANESTHESIOLOGIST IN
21 COLUMBIA ACCORDING TO THIS PAY DATA, THE ANNUAL SALARY?

22 A I'M NOT SURE. IT WOULD -- YOU KNOW, ANESTHESIOLOGIST
23 WITH MORE EXPERIENCE IS GOING TO HAVE -- IS GOING TO GO ON
24 THE SCALE HIGHER THAN AN ANESTHESIOLOGIST RIGHT OUT OF
25 RESIDENCY, SO THERE--

1 Q OKAY. SO YOU DON'T UNDERSTAND HOW TO USE THIS TABLE?

2 A WELL, I CAN'T -- I CAN'T UNDERSTAND THIS TABLE. I
3 UNDERSTAND THE --

4 Q LET'S GO ON TO THE NEXT TABLE.

5 A -- BETTER.

6 Q LET'S GO TO THE NEXT TABLE. MAYBE YOU UNDERSTAND THAT
7 BETTER.

8 A OKAY.

9 Q DID YOU GO ON TO THE NEXT PAGE? HOW ABOUT THIS ONE?

10 A OKAY.

11 Q YOU KNOW WHERE THE COMMUNITY STANDARD IS ON HERE?

12 A LET ME SEE HERE. THE MEDIAN ANESTHESIOLOGY FOR AN
13 ASSOCIATE PROFESSOR IS \$351,000. IN ALL PROBABILITY SOMEONE
14 WITH OVER 15 YEARS EXPERIENCE IN AN ACADEMIC INSTITUTION
15 WOULD LIKELY BE A FULL PROFESSOR AND THAT'S LISTED AT
16 \$380,000.

17 Q SO IS THIS YOUR TESTIMONY THAT THIS IS WHAT THE MARKET
18 PAY SHOULD BE IN COLUMBIA?

19 A THAT'S WHAT -- I MEAN, AS I SAID, MARKET PAY IS A
20 SUPPLEMENT. THIS IS THE INDICATION OF WHAT THE MARKET IS.
21 I'M NOT GOING TO USE THE TERM MARKET PAY. THIS IS AN
22 INDICATION OF WHAT THE MARKET IS IN ACADEMIC INSTITUTIONS
23 WHICH THE VA IN MY EXPERIENCE HAS OFTEN RELIED ON.

24 Q OKAY. SO LET'S JUST THEN -- MAYBE YOU CAN HELP ME IF I
25 APPROACH THIS A DIFFERENT WAY. GOING BACK TO -- GOING THREE

1 PAGES BACK NOW -- TO THE CALCULATION OF YOUR MARKET PAY RIGHT
2 HERE ON -- AT THE BOTTOM, LOWER DOWN ON THIS PAGE.

3 A YES.

4 Q WHAT DO YOU THINK THE MARKET PAY SHOULD -- FIGURE SHOULD
5 HAVE BEEN IN THAT SLOT?

6 A I WOULD LIKE TO HAVE THE -- ALL PAY PANEL CHARTS FOR
7 NOVEMBER 10, 2016 TO ANSWER THAT QUESTION.

8 MR. IRVIN: TAKE A LOOK, SEE IF YOU DON'T HAVE
9 THOSE UP THERE. IF NOT, WE WILL GET THEM FOR YOU.

10 THE WITNESS: I HAVE MAY 1, 2015.

11 MR. IRVIN: AND SAY AGAIN WHAT DATE YOU'RE LOOKING
12 FOR.

13 THE WITNESS: THE NOVEMBER 10, 2016 COLLECTION OF
14 PAY PANELS.

15 MR. IRVIN: HERE YOU ARE. THIS IS EXHIBIT 12, YOUR
16 HONOR. PLAINTIFF'S EXHIBIT 12.

17 THE WITNESS: \$195,678.

18 BY MRS. BAILEY:

19 Q OKAY. AND WHERE DID YOU GET THAT FIGURE FROM?

20 A IT'S FROM DR. ALGHOTHANI'S AWARD AND DR. NGUYEN'S AWARD,
21 WHICH I BELIEVE WAS EXACTLY THE SAME.

22 Q OKAY. NOW WHERE DO THOSE FIGURES COME FROM?

23 A THOSE FIGURES COME BASED UPON THE TESTIMONY OF VA
24 WITNESSES FROM SUBTRACTING THESE ANESTHESIOLOGISTS' BASE PAY
25 FROM THE TOTAL PAY AWARD TO COME UP WITH THE MARKET PAY.

1 Q BUT YOU'RE SAYING THAT'S NOT THE RIGHT WAY TO DO IT. SO
2 GOING BACK TO YOUR WAY, HOW WOULD -- WHAT IS THE RIGHT WAY TO
3 DO THIS?

4 A OKAY. THE RIGHT WAY TO DO THIS IS FOR THE PAY PANEL OF
5 A VETERAN'S ADMINISTRATION AND WHAT I -- PARTICULAR SPECIALTY
6 PHYSICIAN COMES IN, TO LOOK AT THE MARKET BASED UPON SURVEYS
7 THAT ARE SUBMITTED.

8 Q AND THOSE ARE TWO SURVEYS WE JUST LOOKED AT THAT --

9 A YES.

10 Q -- YOU DON'T UNDERSTAND.

11 A WELL, I UNDERSTAND THE ACADEMIC ONE. I DIDN'T QUITE
12 UNDERSTAND THE OTHER ONE. I UNDERSTAND THE ACADEMIC ONE
13 QUITE CLEARLY. AND THE VA TYPICALLY GOES WITH THE ACADEMICS
14 BASED ON MY EXPERIENCE WORKING WITH THE VA.

15 THE PAY PANEL SHOULD LOOK AT WHAT THE COMPENSATION IS IN
16 THE MARKET USING THOSE SURVEYS. THE PANEL SHOULD LOOK AT
17 WHAT KIND OF BASE PAY THEY'RE CONSIDERING IN THE FIRST
18 PHYSICIAN TO COME BEFORE THEM AND THEN THEY SHOULD COME UP
19 WITH A MARKET PAY SUPPLEMENT WHICH IS WHAT WAS DESIGNED BY
20 CONGRESS IN ORDER TO COME UP WITH A TOTAL COMPENSATION THAT
21 WILL BE COMPETITIVE.

22 Q OKAY. SO IN THIS INSTANCE WE HAVE GOT THE SURVEY AND
23 THE NEXT TWO PAGES. WHAT WOULD HAVE BEEN THE SURVEY PAY?

24 A I'M SORRY. I DIDN'T UNDERSTAND YOUR QUESTION.

25 Q USING YOUR THEORY --

1 A YES.

2 Q -- WHICH IS THAT YOU TAKE THE BASE PAY THEN ADD THE
3 SURVEY TO IT OR CONSIDER THE SURVEY WITH IT.

4 A RIGHT.

5 Q HOW WOULD YOU -- WHAT WOULD BE THE SURVEY PAY ON THESE
6 NOVEMBER '86 PAY PANELS?

7 A WELL, THE PAY FOR THE MOST -- THE NEWEST
8 ANESTHESIOLOGIST WOULD LOOK AT -- BECAUSE THESE WERE ALL DONE
9 TOGETHER AND EVERYBODY WAS ALREADY HERE, OKAY? SO THIS
10 WAS -- THIS WAS A LITTLE DIFFERENT SITUATION. BUT THE WAY IT
11 SHOULD OPERATE IS THE PAY PANEL SHOULD LOOK AT A GOAL FOR
12 COMPENSATION AND THEN LOOK AT SOMEONE WHO HAS COME BEFORE
13 THEM, SEE WHAT THEIR BASE PAY IS, AND COME UP WITH A MARKET
14 PAY; MARKET PAY SUPPLEMENT.

15 WHEN THE NEXT -- THE KEY IS WHERE THE NEXT PHYSICIAN
16 COMES ALONG, THEY HAVE THE -- THE PANEL HAS ESTABLISHED WHAT
17 THE APPROPRIATE SUPPLEMENT IS FOR A PERSON WITH THAT -- IN
18 THAT SPECIALTY WITH THAT PARTICULAR LEVEL OF EXPERIENCE BASED
19 ON THE VARIOUS FACTORS.

20 SO WHEN SOMEONE COMES WITH A -- WITH A HIGHER BASE PAY,
21 THAT DOESN'T MEAN THEY ARE NOT ENTITLED TO THE SAME
22 SUPPLEMENT AS THEIR COLLEAGUE. THEY ARE ENTITLED TO THE SAME
23 SUPPLEMENT DETERMINED BY A PREVIOUS PANEL AND ENTITLED TO THE
24 SAME -- TO THEIR BASE PAY AND THEIR RESULTING PAY WILL BE
25 HIGHER; ABSOLUTELY WILL BE HIGHER.

1 Q I HAVE NEVER HEARD OF THIS MARKET PAY SUPPLEMENT. WHERE
2 DOES THAT COME FROM?

3 A THE STATUTE.

4 Q OKAY. WHERE IS THAT FIGURE IN ANYTHING THAT'S BEEN PUT
5 INTO EVIDENCE IN THIS COURT?

6 A I DON'T UNDERSTAND YOUR QUESTION. THAT FIGURE...

7 Q WHERE IS MARKET PAY SUPPLEMENT?

8 A IT IS CLEAR IN--

9 Q IN ANY OF THE DOCUMENTS IN THIS COURT?

10 A IT IS CLEAR FROM THE STATUTE THAT THE MARKET PAY IS A
11 COMPONENT OF TOTAL PAY; A COMPONENT. IT IS NOT THE TOTAL
12 PAY. SO WHEN THE PANEL DETERMINES MARKET PAY, IT DOES NOT
13 SAY THE HAY SURVEY SHOWS THAT THE NORMAL SALARY OF AN
14 ANESTHESIOLOGIST IS 300,000 AND THEN THE PANEL AWARDS A
15 MARKET PAY OF \$300,000. THEY DON'T DO IT THAT WAY --

16 Q AND YOU DON'T WANT THEM TO DO IT THAT WAY.

17 A -- COMPONENT.

18 Q YOU DON'T WANT THEM TO DO IT THAT WAY.

19 A NO, I'M NOT ASKING THEM TO AWARD A MARKET PAY NUMBER
20 THAT IS COMPARABLE TO THE MARKET IN THE COMMUNITY.

21 Q SO JUST LET ME JUST CLARIFY --

22 A RIGHT.

23 Q -- THIS MARKET PAY FIGURE THAT'S PART OF THIS EQUATION
24 WE HAVE BEEN USING, BASE PAY PLUS MARKET PAY EQUALS ANNUAL
25 PAY, YOU DO NOT THINK THAT SHOULD BE THE MARKET PAY IN THE

1 COMMUNITY; IS THAT CORRECT?

2 A THE VA--

3 Q IS THAT YES OR NO?

4 A THE VA MARKET PAY IN -- UNDER THE STATUTE IS A
5 COMPONENT. IT IS NOT THE SAME NUMBER AS THE ACTUAL MARKET
6 SALARY THAT IS SHOWN IN THE COMMUNITY BASED UPON THE SURVEYS.

7 Q ALL RIGHT. SO, THIS MARKET PAY SUPPLEMENT IN YOUR
8 READING OF THE VA REGULATIONS OR THE POLICIES, WHERE DOES IT
9 TALK ABOUT A MARKET PAY SUPPLEMENT?

10 A IT REFERS TO IT AS A COMPONENT.

11 Q COMPONENT.

12 A OKAY. YES. SAME THING.

13 Q OKAY. SO YOU'RE -- IN YOUR VIEW A MARKET PAY COMPONENT
14 MEANS A MARKET PAY AS A SUPPLEMENT TO BASE PAY.

15 A IT'S CLEARLY A SUPPLEMENT OR COMPONENT. IT DOESN'T
16 MATTER HOW YOU CHARACTERIZE IT.

17 Q BUT WHATEVER IT IS, IT'S NOT THE SAME MARKET PAY YOU
18 HAVE OUT IN THE COMMUNITY.

19 A MARKET PAY IS A SPECIFIC DEFINED TERM UNDER THE STATUTE.
20 THE PAY -- THE TERM MARKET PAY IN THE COMMUNITY DOESN'T
21 REALLY MAKE SENSE. YOU CAN TALK ABOUT WHAT THE TYPICAL
22 SALARIES ARE FOR A SPECIALIST IN THE COMMUNITY. MARKET PAY
23 IS A SPECIFIC DEFINED TERM UNDER THE STATUTE. IT'S NOT A
24 TERM THAT'S USED IN THE PRIVATE SECTOR.

25 Q WELL, TALK ABOUT ANNUAL SALARY THEN.

1 A OKAY.

2 Q IS IT YOUR POSITION THAT THE VA'S MARKET PAY COMPONENT

3 --

4 A UH-HUH.

5 Q -- SHOULD HAVE ANY RELATIONSHIP TO THE AVERAGE OR THE

6 ANNUAL SALARY IN THE COMMUNITY?

7 A WHEN IT'S INITIALLY DETERMINED, THAT ANNUAL SALARY

8 AVERAGE IN THE COMMUNITY IS USED TO DETERMINE IT. ONCE IT'S

9 DETERMINED, THEN IT SHOULDN'T BE LESS FOR SOMEONE ELSE WHO

10 HAS THE SAME EXPERIENCE AND THE SAME FACTORS APPLY AND WHEN

11 THAT PERSON HAS, LIKE ME, HAS EVEN SIGNIFICANTLY MORE VA, VHA

12 TIME.

13 Q I UNDERSTAND YOU FEEL THE INJUSTICE. I'M TRYING TO

14 FIGURE OUT WHAT WOULD BE IN THE SECOND FIGURE, THE MARKET PAY

15 FIGURE, FOR DOCTORS ALGHOTHANI AND NGUYEN BACK IN 2016.

16 A THEIR MARKET PAY WAS WHAT I SAID; 195 SOMETHING.

17 Q OKAY.

18 A THAT WHAT YOU'RE ASKING?

19 Q YOU KNOW IF THAT'S CORRECT?

20 A I DON'T KNOW WHETHER IT'S CORRECT OR NOT.

21 Q YOU CAN'T QUARREL WITH THAT.

22 A WITH THE -- WITH THE TOTAL GOAL OF 300,000 FOR SOMEONE

23 BRAND NEW? I DON'T QUARREL WITH THAT.

24 Q SO THE FIGURES FOR DR. ALGHOTHANI AND NGUYEN,

25 ALGHOTHANI -- HERE'S THE FIRST ONE IN THIS BOOK. WE DON'T

1 HAVE TO PULL THAT UP. YOU'RE OKAY WITH THOSE FIGURES; IS
2 THAT RIGHT?

3 A YES. I'M OKAY WITH THEM IF I WAS RECEIVING SOMETHING
4 COMPARABLE OR MORE.

5 Q MAYBE ONE FURTHER. LOOKING DOWN HERE IN PART C WHERE IT
6 SAYS, ANNUAL RATE OF PAY.

7 A YES.

8 Q 104. NOW, THAT'S ALGHOTHANI'S BASE PAY.

9 A YES.

10 Q AND THE MARKET PAY IS 195,678.

11 A YES.

12 Q YOU'RE OKAY WITH THAT FIGURE?

13 A I GUESS. I DON'T HAVE ANY QUARREL WITH IT.

14 Q OKAY. AND THE TOTAL ANNUAL PAY OF 300,000, YOU DON'T
15 QUARREL WITH THAT EITHER?

16 A WELL, DR. ALGHOTHANI, THAT'S APPROPRIATE.

17 Q NOW, YOU'RE ARGUING THAT THERE SHOULD BE SOME KIND OF A
18 DISCOUNT TO ALGHOTHANI'S PAY THAT WOULD BENEFIT YOU. NOW,
19 HOW DO YOU COME UP WITH THAT?

20 A I DON'T UNDERSTAND THE DISCOUNT.

21 Q OKAY. ALGHOTHANI'S MARKET PAY IS 195.

22 A YES.

23 Q AND YOU'RE SAYING THAT THAT IS TOO MUCH FOR HIM OR IT
24 SHOULD BE DISCOUNTED FOR HIM?

25 A NO, I'M NOT SAYING THAT. I -- THAT'S FINE AS LONG AS --

1 AS OTHER PEOPLE WITH -- THAT HAVE THE SAME FACTORS AS DR.
2 ALGHOTHANI ALSO RECEIVE THAT, OR IF THEIR -- IF THEIR FACTORS
3 WEIGH MORE THAN OTHER PEOPLE IN THE SAME PANEL AT THE SAME
4 TIME RECEIVE MORE THAN THAT.

5 Q OKAY.

6 A BUT -- BUT--

7 Q BUT YOU'RE OKAY--

8 A BUT LET ME FINISH HERE. THE FACT THAT MY BASE PAY --
9 HIS IS 104,322. MINE WAS, WHAT, 130 SOMETHING. I SHOULD NOT
10 BE PENALIZED BECAUSE I HAD SPENT MANY YEARS AT THE VA AND
11 ACCUMULATED MULTIPLE STEP INCREASES AND HAD -- BASICALLY HAVE
12 MY STEP INCREASES DEDUCTED FROM WHAT THE PANEL HAS DETERMINED
13 TO BE AN APPROPRIATE MARKET PAY TO THEN GIVE ME A
14 SIGNIFICANTLY REDUCED MARKET PAY MERELY BECAUSE I HAVE GOT A
15 LOT OF YEARS AT THE VA AND THEY ARE NOT GOING TO LET ME BE
16 COMPENSATED FOR IT.

17 Q OKAY. BUT YOU DON'T -- JUST TO REITERATE AND WE CAN
18 PROBABLY MOVE ON, THE -- THE FORMULA WHICH IS BASE PAY PLUS
19 MARKET PAY EQUALS TOTAL PAY, YOU'RE FINE WITH THAT?

20 A FINE WITH THAT, BUT I'M NOT --

21 Q AND ALSO--

22 A BUT -- I'M NOT FINE WITH THE VA HAVING COMPENSATION
23 PANELS DETERMINE TOTAL PAY. THAT CREATES BASICALLY AN ABSURD
24 SITUATION BECAUSE WHEN THE PANEL -- IF THE CONGRESS HAD
25 INTENDED FOR THE COMPENSATION PANELS TO DETERMINE TOTAL PAY,

1 IT WOULD HAVE SAID SO, BUT IT DIDN'T. IT SET FORTH THESE
2 DIFFERENT COMPONENTS OF PAY.

3 SO, WHEN THE VA CONTRARY TO THE INTENT OF CONGRESS HAVE
4 THE COMPENSATION PANELS DETERMINE TOTAL PAY, IT MAKES THE
5 WHOLE CONCEPT OF BASE PAY AND MARKET PAY BASICALLY AN
6 ABSURDITY BECAUSE YOU HAVE GOT CLERICAL PEOPLE IN THE VA WHO
7 ARE VISUALLY LOOKING AT DOCUMENTS AND -- AFTER AN AWARD OF
8 SAY 300,000, OKAY, NOW WHAT IS THE -- IS THE BASE PAY? OKAY,
9 WE GOT THE BASE PAY, NOW LET'S SUBTRACT THAT, WE COMING UP
10 WITH THIS MARKET PAY. WELL THESE --

11 Q DR. KENNEDY--

12 A -- THESE ARE MEANINGLESS NUMBERS.

13 Q ANSWER MY QUESTION, WE MIGHT COULD GO HOME TODAY.

14 A OKAY.

15 Q THE SECOND COMPONENT, WHICH IS THE MARKET PAY SUPPLEMENT
16 --

17 A YES.

18 Q -- IS ONE THAT YOU FEEL THEY SHOULD BE USING.

19 A YES. THAT STATUTE SAYS THAT THEY SHOULD DETERMINE
20 MARKET PAY, THE MARKET PAY COMPONENT, USING THE FACTORS
21 LISTED IN THE STATUTE, YES.

22 Q OKAY. AND THAT MARKET PAY COMPONENT MAY VERY WELL NOT
23 BE THE MARKET PAY NUMBER THAT'S IN THE SURVEYS.

24 A IT'S NEVER GOING TO BE THE MARKET PAY THAT'S IN THE
25 SURVEYS. IT'S A COMPONENT. IT'S NEVER GOING TO BE WHAT THE

1 AVERAGE SALARIES ARE IN THE COMMUNITY.

2 Q OKAY. THANK YOU. WE CAN -- LET'S JUST MOVE ON.

3 A OKAY.

4 Q WE ARE BEATING A DEAD HORSE HERE. I WANT YOU TO LOOK
5 DOWN HERE AT EXHIBIT 10 WHICH IS ONE OF THESE THINGS THAT YOU
6 TESTIFIED TO ON DIRECT EXAMINATION.

7 A OKAY.

8 Q IT'S -- YOUR LAWYER TOOK YOU THROUGH THESE AND ASKED YOU
9 TO COMPARE THESE FACTORS ON THE DIFFERENT DOCTORS.

10 A YES.

11 Q AND GOING BY THIS CHART YOU SAY HERE, PLAINTIFF'S
12 EXHIBIT 10, NUMBER FOUR FOR DR. PRYOR --

13 A OKAY.

14 Q -- SAYS HE'S GOT OVER 20 YEARS OF EXPERIENCE. YOU SEE
15 THAT?

16 A I SEE THAT.

17 Q AND THEN THE NEXT PAGE OVER IS DR. PENDER.

18 A YES.

19 Q AND HE, TOO, HAS OVER 20 YEARS OF EXPERIENCE.

20 A OKAY. IT'S WHAT IT SAYS.

21 Q GO OVER TO DR. NGUYEN.

22 A OKAY.

23 Q HE'S JUST GOT OVER 17 YEARS EXPERIENCE.

24 A THAT'S PROBABLY NOT CORRECT THAT DR. NGUYEN HAS LESS
25 BECAUSE DR. NGUYEN, I BELIEVE -- I'M PRETTY SURE IF YOU'RE

1 LOOKING AT YEARS OF EXPERIENCE, HE HAS PROBABLY SLIGHTLY MORE
2 YEARS OF EXPERIENCE THAN ANYONE. I KNOW HE HAD THREE YEARS
3 MORE EXPERIENCE THAN ME AND HE'S PROBABLY GOT NUMBER -- A
4 GOOD MANY NUMBER OF YEARS MORE EXPERIENCE THAN DR.
5 ALGHOTHANI.

6 Q SO YOU'RE SAYING DR. NGUYEN IS THE MOST EXPERIENCED OF
7 THE GROUP?

8 A HE HAS BEEN AN ANESTHESIOLOGIST FOR THE MOST NUMBER OF
9 YEARS.

10 Q AND IT SAYS -- WHERE IT SAYS OVER 17, THAT MIGHT BE AN
11 UNDERSTATEMENT?

12 A I DON'T KNOW. I REALLY -- I HAVE THE CV SOMEWHERE. I
13 HAVE REVIEWED THESE AND HAVE PUT SOME OF THESE YEARS ON MY
14 CHART. BUT IT APPEARS THAT DR. MILLER OR WHOEVER PREPARED
15 THIS NARRATIVE HAS MADE SOME ERRORS ON THESE.

16 Q OKAY. AND YOU IN FACT, WHERE IT SAYS YOU HAVE OVER 17
17 YEARS EXPERIENCE, YOUR EXPERIENCE AS AN ANESTHESIOLOGIST
18 MIGHT HAVE BEEN -- WAS PROBABLY AROUND 19?

19 A LET'S SEE. FIND MINE. OKAY. OVER 20 YEARS OF
20 EXPERIENCE IN ANESTHESIOLOGIST -- THIS WOULD HAVE BEEN -- IS
21 THIS THE...

22 Q IT'S KENNEDY VA UNDERSCORE 263.

23 A IS THIS THE ONE FROM THE 5-1-15 COMPENSATION PANEL OR
24 THE ONE FROM THE 11-10-16 COMPENSATION PANEL? I DON'T KNOW.

25 Q OKAY. WELL, SUPPOSE IT WAS THE 15 ONE.

1 A OKAY. IF THE 15--

2 Q WHAT WAS YOUR YEARS--

3 A MY YEARS OF VA EXPERIENCE WOULD HAVE BEEN 17 AND MY
4 YEARS OF ANESTHESIA EXPERIENCE WOULD HAVE BEEN 20 AT -- MAKE
5 IT -- IN MAY OF 2015.

6 Q OKAY. SO THE POINT IS ALL OF Y'ALL HAD BETWEEN 17 AND
7 20, AND THEN DR. NGUYEN HAD EVEN MORE THAN ANYBODY ON THIS --

8 A I DON'T --

9 Q -- ON THIS PAGE HERE--

10 A -- EXACT NUMBERS, BUT WE HAD COMPARABLE NUMBER OF YEARS
11 OF EXPERIENCE.

12 Q OKAY. AND AS I UNDERSTAND IT FROM YOUR PRIOR TESTIMONY,
13 YOU'VE PERSONALLY NEVER BEEN OFFERED A JOB OUTSIDE OF THE VA?

14 A NO, I HAVE NOT.

15 Q HAVE YOU EVER ACTIVELY APPLIED FOR A JOB?

16 A APPLIED, NO.

17 Q SO YOU DON'T KNOW PERSONALLY WHAT YOUR VALUE IS TO A
18 ANESTHESIOLOGY PRACTICE IN COLUMBIA.

19 A THEY DON'T SEEM TO VALUE OLDER PEOPLE BASED UPON MY
20 EXPERIENCE. THEY HAVE -- THEY PLACE MORE VALUE ON SOMEONE
21 WHO COMES IN AS A -- SOMEONE OFF -- BEFORE A PARTNERSHIP
22 TRACK AND WHO IS GOING TO BE WITH THEIR GROUP FOR A LONG
23 PERIOD OF TIME.

24 Q YEP. WANT TO ASK YOU ABOUT -- THIS IS ANOTHER THING YOU
25 SPOKE -- YOU DISCUSSED WITH YOUR LAWYER. IT'S PLAINTIFF'S

1 EXHIBIT NUMBER 5 AND IT'S THE NAEL ALGHOTHANI BOARD PAPERS.

2 IF YOU COULD TURN TO KENNEDY PAGE TWO.

3 A OKAY.

4 Q NOW, JUST TO REFRESH ME, THIS IS THE BOARD THAT YOU
5 PRESENTED WHEN YOU WERE ACTING CHIEF OF THE ANESTHESIOLOGY
6 GROUP?

7 A YES.

8 Q AND THIS WAS IN MAY 22, 2014.

9 A YES.

10 Q AND YOU HAD SOME CONCERN THAT THE BOARD WAS CURSORY IN
11 ITS CONSIDERATION OF DR. ALGHOTHANI?

12 A YES.

13 Q AND LOOK AT THE -- I WAS LOOKING AT THIS COVER
14 MEMORANDUM, FIRST PAGE KENNEDY NUMBER TWO. THAT'S ACTUALLY
15 YOUR SIGNATURE AT THE BOTTOM; ISN'T IT?

16 A IT IS. I DID NOT DRAFT THIS LETTER. IT WAS DRAFTED BY
17 SOMEONE IN THE ADMINISTRATION FOR MY SIGNATURE.

18 Q OKAY. NUMBER ONE IT SAYS, I RECOMMEND THAT NAEL
19 ALGHOTHANI RECEIVE AN EXCEPTION TO THE PAY CAP AND THAT HE
20 GET 288.

21 A YES.

22 Q THAT'S WHAT YOU RECOMMENDED.

23 A YES, I RECOMMENDED -- I WAS RECOMMENDING -- I HAD
24 RECOMMENDED THAT AS I HAVE TESTIFIED AT THE COMPENSATION
25 PANEL. I RECOMMENDED THAT HE RECEIVE THAT IN TOTAL

1 COMPENSATION AND, AS I HAVE ALSO TESTIFIED PREVIOUSLY, IT WAS
2 ROUTINE FOR US TO GO BEYOND THE FACILITY TO GET APPROVAL
3 BECAUSE THE FACILITY PAY CAP WAS 275, AND ALGHOTHANI WAS
4 BEING AWARDED 288, SO IT HAD TO GO UP TO THE VISN TO BE --
5 FOR AN EXCEPTION TO BE APPROVED.

6 Q THEN NUMBER TWO IN YOUR LETTER IT TALKS ABOUT THE MARKET
7 PAY AND THE AREA. DO YOU SEE THAT?

8 A YES.

9 Q OF 331 FOR AN ASSOCIATE PROFESSOR, THAT HAY BEING 329.
10 YOU SEE THAT?

11 A YES.

12 Q AND THAT'S INFORMATION THAT YOU PROVIDED TO THE BOARD;
13 IS THAT RIGHT?

14 A I JUST TOOK DOCUMENTS THAT WERE GIVEN TO ME AND
15 PRESENTED THEM.

16 Q YOU JUST SIGNED IT BECAUSE THEY GAVE IT TO YOU. YOU
17 NEVER EVEN LOOKED AT IT; IS THAT RIGHT?

18 A I DIDN'T HAVE ANY AUTHORITY TO CHANGE ANYTHING.

19 Q AND YOU DIDN'T WANT TO CHANGE ANYTHING.

20 A I HAD NO REASON. I HAD -- I HAD NOT SURVEYED AND
21 STUDIED THE PAY STATUTE AT THE TIME THIS WAS PREPARED. I WAS
22 GOING THROUGH THE MOTIONS AS I HAD BEEN REQUESTED TO DO.

23 Q OKAY. AND YOU NOTICED THAT YOU, YOURSELF, IN THIS
24 LETTER THAT YOU SIGNED SAID THAT ALGHOTHANI HAD OVER 10 YEARS
25 OF EXPERIENCE IN ANESTHESIA, AND YOU GO THROUGH WHAT HIS

1 CERTIFICATIONS ARE.

2 A YES.

3 Q THEN NUMBER FOUR IS THE NEED BECAUSE THE SPACE HAD BEEN
4 VACANT SINCE JANUARY.

5 A WE NEEDED DR. ALGHOTHANI, NO QUESTION.

6 Q AND THEN YOU WERE THE ONE WHO PRESENTED THIS INFORMATION
7 TO THE BOARD; YOU PERSONALLY.

8 A THIS INFORMATION WE'RE TALKING ABOUT, JUST TO BE CLEAR,
9 WAS PRESENTED TO VISN. I DID PRESENT INFORMATION TO THE
10 BOARD THAT HAD BEEN PREPARED BY EITHER DR. MILLER OR HIS
11 ADMINISTRATIVE ASSISTANT. I TOOK THE INFORMATION -- THE
12 PAPERWORK THEY GAVE ME AND I PRESENTED IT TO THE BOARD.

13 Q OKAY. AND YOU DIDN'T REALLY LOOK AT IT AND YOU DIDN'T
14 CARE WHAT IT WAS. YOU JUST PRESENTED IT JUST--

15 A I WANTED DR. ALGHOTHANI TO BE HIRED. I WANTED THEM TO
16 APPROVE HIS SALARY SO THAT HE WOULD BE.

17 Q OKAY.

18 A YES.

19 Q GOING ON TO THE NEXT PAGE, WHICH WILL BE KENNEDY
20 UNDERSCORE FIVE.

21 A PLAINTIFF'S EXHIBIT 5?

22 Q YES, SIR.

23 A OKAY. AND BOTTOM? ALL RIGHT.

24 Q NOW, YOU PRESENTED THIS PAPERWORK TO THE BOARD; RIGHT?

25 A THIS DOCUMENT I'M HOLDING IN MY HAND IS THE PANEL

1 DECISIONS. NOT SOMETHING I PRESENTED.

2 Q YOU PRESENTED THE INFORMATION TO THE BOARD?

3 A I'M SURE I DID.

4 Q YOU ANSWERED ANY QUESTIONS THEY HAD?

5 A THERE WERE NO QUESTIONS.

6 Q THE PANEL MEMBERS SIGNED THIS?

7 A YES, THEY DID.

8 Q DID THEY SIGN IT IN YOUR PRESENCE?

9 A I'M SURE THEY DID. YES, I WAS THERE.

10 Q DO YOU HAVE ANY REASON TO THINK THAT THEY -- THEY WERE
11 UNAWARE OF WHAT THEY WERE SIGNING OF THE -- OF THEIR ANNUAL
12 RATE OF PAY?

13 A IT WAS CLEAR TO ME THAT THEY--

14 Q MY QUESTION WAS, DO YOU HAVE ANY REASON TO THINK THAT
15 THEY DID NOT KNOW WHAT THE ANNUAL RATE OF PAY WAS THAT THEY
16 WERE AGREEING TO?

17 A SPECULATING ON WHAT THEY KNEW? I DON'T KNOW WHAT THEY
18 KNEW OTHER THAN WHAT I COULD SAY THAT I OBSERVED. I'LL BE
19 HAPPY TO TELL YOU WHAT I OBSERVED.

20 Q AND JUST REAL QUICKLY GOING ON TO PLAINTIFF'S EXHIBIT
21 NUMBER 18. THIS IS SOMETHING THAT YOU DREW UP YOURSELF?

22 A YES, IT IS.

23 Q NO ECONOMIST OR OTHER EXPERT HAS LOOKED AT IT?

24 A NO.

25 Q DID YOU EVER ASK ANYBODY AT OPM TO SEE IF THESE FIGURES

1 WERE CORRECT?

2 A I WOULDN'T HAVE ANY IDEA HOW TO DO THAT.

3 Q OKAY. WANT TO ASK YOU ABOUT NUMBER THREE.

4 A YES.

5 Q NOW, YOU TALK ABOUT DR. LEDER.

6 A YES.

7 Q WHAT WAS HIS AGE?

8 A I HAVE IT PROBABLY IN MY FILES SOMEWHERE, BUT I DON'T
9 RECALL IT RIGHT OFF-HAND. I KNOW HE WAS YOUNGER THAN I.

10 Q AND WHAT WAS HIS YEARS OF PRACTICE?

11 A I DON'T RECALL SPECIFICALLY. IT WAS CLOSE PROBABLY
12 AROUND SIMILAR TO ME. I DON'T RECALL SPECIFICALLY.

13 Q HOW ABOUT DR. CARTER? WHAT WAS HIS AGE?

14 A I KNOW DR. CARTER WAS -- WAS YOUNGER THAN I AND I THINK
15 HE HAD MORE YEARS OF EXPERIENCE AS A PRACTICING
16 ANESTHESIOLOGIST THAN I.

17 Q OKAY.

18 A BUT OUR OTHERWISE COMPETENCE IN ANESTHESIA ABILITIES
19 WERE VERY, VERY COMPARABLE.

20 Q AND THEN I WANT TO ASK YOU ABOUT THIS -- YOU SAID
21 THERE -- THE VA SHOULD REWARD LONGEVITY.

22 A I SAID--

23 Q WHERE -- WHERE IN THE POLICY, IN THE STATUTES, OR
24 ANYTHING ABOUT THE -- ABOUT THE VETERAN ADMINISTRATION DOES
25 IT SAY THAT THEY REWARD LONGEVITY?

1 A OKAY. THERE IN THE PAY ACT OF 2006, THEY CREATE THREE
2 COMPONENTS OF PAY; BASE PAY, MARKET PAY, AND PERFORMANCE PAY.
3 AS WE KNOW, PERFORMANCE PAY IS NOT AT ISSUE IN THIS
4 LITIGATION--

5 Q IT DOESN'T SAY THERE THAT THEY REWARD LONGEVITY?

6 A I'M TRYING TO ANSWER YOUR QUESTION.

7 Q OKAY. SO YOU'RE JUST GOING BACK TO THE FACT THAT THAT'S
8 THE FORMULA FOR CALCULATING IT?

9 A NO, NOT TALKING ABOUT THE FORMULA. YOU ASKED ME ABOUT
10 WHAT -- WHY DO I THINK CONGRESS INTENDED TO REWARD --

11 Q NO--

12 A -- LONGEVITY OR WHY THE VA INTENDS TO--

13 Q THAT'S NOT--

14 THE COURT: THAT WASN'T THE QUESTION. THE QUESTION
15 WAS WHERE IN THE STATUTE DOES IT SAY THE VA SHOULD REWARD
16 LONGEVITY.

17 THE WITNESS: OKAY.

18 THE COURT: SO, IF YOU CAN POINT TO SOMETHING IN
19 THE STATUTE THAT SAYS THAT, THAT WOULD ANSWER THE QUESTION.

20 THE WITNESS: OKAY. I CAN.

21 BY MRS. BAILEY:

22 Q OKAY. GOOD.

23 A THE SECTION ON BASE PAY HAS CHARTS ATTACHED TO IT WHERE
24 VA PHYSICIANS ARE GIVEN STEP INCREASES, SIGNIFICANT STEP
25 INCREASES, EVERY TWO YEARS THEY ARE THERE. STEP INCREASES

1 ARE REWARDS FOR LONGEVITY -- LONGEVITY. IN THE MARKET PAY
2 PROVISION OF THE STATUTE PASSED BY CONGRESS THEY LIST FACTORS
3 TO BE -- THAT SHOULD BE CONSIDERED. ONE OF THOSE FACTORS IS
4 LENGTH OF VHA SERVICE.

5 SO, THE BASE PAY PART OF THE STATUTE REWARDS LONGEVITY
6 IN THE WAY IT PROVIDES STEP INCREASES. IN THE MARKET PAY
7 PROVISIONS OF THE STATUTE IT DIRECTS THE COMPENSATION PANEL
8 TO GIVE CONSIDERATION IN AWARD OF MARKET -- OF THE MARKET PAY
9 COMPONENT TO V -- YEARS OF VHA SERVICE.

10 Q IS THAT ALL YOU GOT TO BASE YOUR REWARD, LONGEVITY ON?

11 A THAT'S -- THAT'S MY COMMENT ON THE -- YOU ASKED ME ABOUT
12 WHAT DOES THE -- HOW DOES THE STATUTE SHOW THAT IT REWARDS
13 LONGEVITY AND I HAVE ANSWERED THAT.

14 Q ONE MINUTE WHILE I CONSULT.

15 MRS. BAILEY: NO FURTHER QUESTIONS, YOUR HONOR.

16 MR. IRVIN: WE HAVE NOTHING FURTHER, YOUR HONOR.

17 THE COURT: ALL RIGHT. I JUST WANT TO MAKE CLEAR,
18 SURE THAT EVERYONE IN THE -- THAT YOU HAVE COMPARED YOURSELF
19 TO IN THE DEPARTMENT IS OVER 40 YEARS OLD; CORRECT?

20 THE WITNESS: YES.

21 THE COURT: OKAY. I DON'T HAVE ANYTHING ELSE.
22 THANK YOU. YOU CAN STEP DOWN.

23 (WITNESS LEFT THE STAND.)

24 THE COURT: ALL RIGHT. DO YOU WANT TO HAVE ANY
25 OTHER WITNESSES?

1 MR. IRVIN: YOUR HONOR, THAT'S ALL THE WITNESSES
2 FOR THE PLAINTIFF. I THINK WE HAD 13 OF THEM.

3 THE COURT: ALL RIGHT. THANK YOU. ANY WITNESSES,
4 ADDITIONAL WITNESSES, FOR THE GOVERNMENT? I KNOW THAT YOU
5 WERE ASKED TO EXAMINE THE WITNESSES AS IF THEY WERE YOUR
6 DIRECT EXAMINATION.

7 MRS. BAILEY: NO ADDITIONAL WITNESSES, YOUR HONOR.

8 THE COURT: ANY ADDITIONAL ARGUMENT THAT THE
9 PARTIES WANT TO MAKE? SHORT AND BRIEF.

10 MR. IRVIN: SHORT AND VERY BRIEF, YOUR HONOR. I
11 SAID AT THE BEGINNING THAT THE CASE INVOLVES THE
12 ANESTHESIOLOGISTS AT DORN.

13 COURT REPORTER: CAN YOU GET TO A MICROPHONE?

14 MR. IRVIN: OH, I BEG YOUR PARDON.

15 COURT REPORTER: THANK YOU.

16 MR. IRVIN: YOUR HONOR, I SAID THAT THE CASE IS
17 ABOUT ANESTHESIOLOGISTS AT DORN VA MEDICAL CENTER AND THE
18 AMOUNTS OF MARKET PAY THOSE ANESTHESIOLOGISTS RECEIVE. THE
19 CASE IS NOT ABOUT UROLOGISTS IN OREGON OR IN DIFFERENT
20 FACILITIES ACROSS THE COUNTRY IN DIFFERENT SPECIALTIES.

21 WE FOCUSED, AS YOUR HONOR HAS CLEARLY POINTED OUT, ON
22 THOSE STAFF ANESTHESIOLOGISTS AT THE DORN VA MEDICAL CENTER.
23 AND WE BELIEVE, YOUR HONOR, THAT THE METHODOLOGY THAT IS
24 APPLIED AND WHICH ALL -- VIRTUALLY EVERY WITNESS THAT
25 PARTICIPATED IN THESE PANELS TESTIFIED -- THE METHODOLOGY

1 THAT IS APPLIED AND APPARENT -- AND NOT APPARENT -- AND
2 APPROVED BUT RIGHT ON UP THE CHAIN IN THE VA IS SIMPLY THAT
3 MARKET PAY, RATHER THAN BEING SEPARATELY DETERMINED AS
4 REQUIRED BY THE STATUTE, IS PURELY AN ARITHMETIC CALCULATION.

5 THE VA DECIDES WHAT IT WANTS THE TOTAL SALARY TO BE FOR
6 SOMEONE AND THEY PRESENT THAT TO THIS PANEL AND THE PANEL
7 ADOPTS THAT AND THEN HR TAKES THE TOTAL NUMBER AND GOES TO
8 THE LONGEVITY PAY TABLE AND DETERMINES THE BASE PAY BASED ON
9 THE TABLE AND THEN SIMPLY SUBTRACTS FROM THE TOTAL PAY THE
10 ANNUAL PAY NUMBER THAT IS APPROVED BY THE PANEL, THE BASE
11 PAY, AND THAT IS HOW THEY DETERMINE MARKET PAY.

12 AND THE FACTORS THAT ARE IN THE STATUTE AND THEN
13 SIMILARLY IN THE VA HANDBOOK, THERE'S CERTAINLY EVIDENCE IN
14 THE RECORD THAT AT LEAST BEGINNING IN 2015 THEY AT LEAST HAD
15 TYPED-UP SHEETS THAT HAD THAT INFORMATION ON IT. BUT WHAT IS
16 ABSOLUTELY CLEAR IS THAT BOTH THE STATUTE AND THE HANDBOOK
17 SAY THAT THOSE FACTORS ARE TO BE TAKEN -- THE STATUTE SAYS
18 SHALL TAKE INTO ACCOUNT THOSE, THOSE FACTORS IN DETERMINING
19 MARKET PAY, AND THAT IS THE VIOLATION OF THE STATUTE; THAT
20 THEY ARE NOT TAKING THOSE FACTORS INTO DETERMINATION IN
21 ARRIVING AT AN AWARD OF MARKET PAY.

22 AND WHAT DR. KENNEDY FOUND AND WHAT WE HAVE PRESENTED --
23 AND I DON'T THINK IT'S CONTESTED -- IS THAT THERE IS AN
24 INVERSE CORRELATION BETWEEN AGE AND AWARD OF MARKET PAY AMONG
25 THIS GROUP THAT WE FOCUS ON HERE. AND WITH REGARD, YOUR

1 HONOR, TO ANY BUSINESS NECESSITY, ALL THEY NEEDED TO DO WAS
2 APPLY THE STATUTE AS IT IS WRITTEN.

3 AND IF YOU LOOK AT THE CALCULATIONS THAT DR. KENNEDY HAS
4 MADE, WHICH THE EVIDENCE WILL SUPPORT, THAT EVEN WITH HIS
5 CALCULATIONS AND INCREASING HIS MARKET PAY AWARD, WHICH HAS
6 THE IMPACT OF INCREASING HIS TOTAL SALARY, HE'S GOING TO BE
7 WITHIN THE RANGE OF WHAT IS TYPICALLY -- HAS BEEN APPROVED IN
8 THE ANESTHESIOLOGY DEPARTMENT BY WAY OF EXCEPTIONS REQUESTED
9 AND APPROVED JUST LIKE DR. KENNEDY DID FOR DR. ALGHOTHANI AT
10 THE VISN LEVEL.

11 AND SO THERE'S NOT GOING TO BE A CRISIS HERE AND NO ONE,
12 CERTAINLY DR. KENNEDY, IS NOT ASKING ANYBODY TO ADJUST HIS
13 SALARY AT \$427,000 OR SOMETHING LIKE THAT BUT SIMPLY TO PUT
14 HIM IN LINE BASED ON THE STATUTORY FACTORS. AND IT IS
15 UNDISPUTED IN THIS CASE THAT THE ONLY FACTOR THAT REALLY
16 MATTERS IN THIS CASE IS THE PRIOR VA EXPERIENCE -- AND
17 UNDENIABLY DR. KENNEDY HAS THE HIGHEST AMOUNT OF EXPERIENCE
18 THAN ANY OF THE STAFF ANESTHESIOLOGISTS.

19 AND SO ALL WE'RE SAYING IS THAT BECAUSE OF THAT, WITH
20 EVERYTHING ELSE BASICALLY BEING EQUAL, HE SHOULD RECEIVE AT
21 LEAST AS MUCH AS THE HIGHEST MARKET PAY AWARD FOR THE STAFF
22 ANESTHESIOLOGISTS AS WAS GIVEN BY A PANEL FOR ANY PAY PERIOD
23 AND WE BELIEVE THAT YOUR HONOR HAS THE AUTHORITY UNDER THE
24 APPLICABLE STATUTES TO DIRECT THE GOVERNMENT TO RECALCULATE
25 DR. KENNEDY'S SALARY BY INCREASING HIS MARKET PAY. AND IN

1 DOING SO, THEY WILL ALSO HAVE RECALCULATED SUCH THAT HIS
2 PENSION BENEFITS WOULD LIKE -- LIKEWISE INCREASE IN
3 ACCORDANCE WITH HIS INCREASED SALARY.

4 AND SO, YOUR HONOR, IT SEEMS TO ME THAT THE HEART OF THE
5 CASE IS SIMPLY THAT YOU HAVE A STATUTE, AND THEY MIGHT NOT
6 LIKE IT, BUT THEY GOT TO GO BY IT, AND IT SAYS WHAT IT SAYS
7 AND THAT IS WHAT FOLKS LIKE DR. KENNEDY RELY ON IS THAT THE
8 GOVERNMENT WILL ABIDE BY THE STATUTES THAT CONTROL ITS
9 ABILITY TO AWARD SALARIES.

10 AND SO, I BELIEVE, YOUR HONOR, THAT THE REAL DISPUTE
11 HERE IS THAT THE GOVERNMENT SAYS THAT IT DOES NOT WANT TO
12 GIVE DR. KENNEDY CREDIT FOR HIS LONGEVITY AT THE VA BECAUSE
13 HE'S ALREADY GETTING IT THROUGH THE BASE PAY. AND
14 UNFORTUNATELY, YOUR HONOR, THAT WOULD MEAN THAT WE WOULD HAVE
15 TO TAKE OUT OUR PEN AND STRIKE THROUGH WHAT CONGRESS HAS PUT
16 IN THE STATUTE WHERE THEY CLEARLY SAY THAT THE DETERMINATION
17 OF MARKET PAY SHALL TAKE INTO ACCOUNT THE PRIOR EXPERIENCE OF
18 THE PHYSICIAN. SHALL TAKE INTO ACCOUNT. THEY MUST GIVE IT
19 WEIGHT.

20 AND WHAT THEY ARE SAYING IS, ALREADY GIVEN HIM THAT IN
21 BASE PAY. AND WHAT WE ARE SAYING IS HE IS ENTITLED TO THAT
22 BASE PAY THAT HE RECEIVES AND THOSE LONGEVITY STEPS ALONG THE
23 WAY, HE'S ENTITLED AND EARNED THAT BASE PAY AND AT THE SAME
24 TIME HE IS ENTITLED UNDER THE STATUTE TO HAVE THAT LONGEVITY
25 FACTORED IN AND TAKEN INTO ACCOUNT ALSO IN HIS DETERMINATION

1 IN MARKET PAY. AND IN THIS CASE THAT FACTOR IS THE ONLY REAL
2 DIFFERENCE.

3 ALL THE WITNESSES, THE VA WITNESSES SAID OTHERWISE,
4 THEY'RE QUALIFIED. AND SO THAT'S -- THAT'S AT THE HEART OF
5 THE CASE AND THEY CAN'T IGNORE THAT.

6 THE COURT: MR. IRVIN, THIS IS A DISPARATE IMPACT
7 CASE.

8 MR. IRVIN: YES, MA'AM.

9 THE COURT: AND FOR ARGUMENT PURPOSES, JUST FOR THE
10 SAKE OF THE ARGUMENT, EVEN IF THE VA VIOLATED THE STATUTE,
11 HOW HAVE YOU PROVED THAT THAT VIOLATION, IF IN FACT IT WAS,
12 HAS A DISPARATE IMPACT ON THE OTHER DOCTORS THAT ARE SUBJECT
13 TO THE SAME POLICY?

14 MR. IRVIN: THANK YOU, YOUR HONOR. BECAUSE RIGHT
15 DOWN THE LINE, THE DOCTORS IN THE ANESTHESIOLOGY GROUP,
16 AGE -- AND THEIR AGES ARE SUBJECTED TO THE DISPARATE IMPACT
17 HERE WHICH IS THE YOUNGER GUYS, YOU'RE ALL MEN, RECEIVE
18 HIGHER MARKET PAYS AND RIGHT ON UP THE CHAIN.

19 THE COURT: BUT ALL OF THE INDIVIDUALS THAT HAVE
20 BEEN COMPARED TO DR. KENNEDY ARE ALL IN THE PROTECTED GROUP
21 AND THEY ARE ALL OVER 40 YEARS OLD. SO...

22 MR. IRVIN: YES, MA'AM.

23 THE COURT: WHAT CASE LAW DO YOU HAVE TO SUPPORT
24 YOUR POSITION THAT IT MAKES -- THAT THEY WOULD BE APPROPRIATE
25 TO COMPARE IN THIS CASE?

1 MR. IRVIN: AND YOUR HONOR, I AM GOING TO TURN MY
2 MICROPHONE OVER TO MRS. FULMER, MAYBE IN JUST A METAPHORIC
3 SENSE, BUT WE WOULD LIKE THE OPPORTUNITY TO PROVIDE YOU WITH
4 SOME AUTHORITY ON THAT, AND IT MAY BE THAT WE HAVE SOME, BUT
5 THAT IS THE POOL. IT IS WHAT IT IS. THEY ARE ALL OVER 40.

6 THE COURT: I UNDERSTAND THAT AND I UNDERSTAND THE
7 CONCERN ABOUT, BUT I HAVE TO GO BY WHAT THE LAW IS HERE. AND
8 HIS COMPARATORS ARE ALL IN THE PROTECTED GROUP.

9 MR. IRVIN: I UNDERSTAND.

10 THE COURT: AND SO I NEED SOME CASE LAW TO SUPPORT
11 YOUR POSITION.

12 MR. IRVIN: YES, MA'AM.

13 THE COURT: OKAY.

14 MR. IRVIN: THANK YOU.

15 MRS. BAILEY: YOUR HONOR, I WAS GOING TO SHOW A
16 35-MINUTE POWERPOINT, BUT IN LIGHT OF THE LATENESS OF THE
17 DAY, MR. ANDREWS SAID HE CAN SUM IT UP.

18 THE COURT: OKAY.

19 MRS. BAILEY: AND I THOUGHT, GREAT IDEA.

20 MR. ANDREWS: YOUR HONOR, I WILL ONLY BE 32, 33
21 MINUTES AT MINIMUM. THAT'S A JOKE.

22 YOUR HONOR, I WILL BE AS BRIEF AS I CAN. FRANKLY I
23 BELIEVE THAT THE EVIDENCE HAS SHOWN THAT ALL OF THE ISSUES I
24 IDENTIFIED IN MY OPENING AND MY POWERPOINT IS INCLUDED IN
25 YOUR TRIAL BRIEF HAVE COME TO BEAR. WE HAVE SEEN THE

1 EVIDENCE DEMONSTRATE EXACTLY WHAT WE THOUGHT IT WOULD.

2 AND I WANT TO DRAW THE COURT'S ATTENTION TO ONE THING.
3 IN FACT, YOU JUST MENTIONED IT. THE PLAINTIFF AND IN FACT
4 MR. IRVIN HAVE BOTH TOLD US WHAT THIS CASE IS ABOUT. THIS
5 CASE IS ABOUT THE PLAINTIFF'S GRIEVANCE THAT THEY HAVE NOT
6 GIVEN HIM ENOUGH PAY FOR HIS TENURE AT THE VA.

7 AND I UNDERSTAND THE GRIEVANCE. IT MAY BE EVEN A
8 LEGITIMATE GRIEVANCE. BUT WE ARE NOT LITIGATING A VIOLATION
9 OF THE PAY ACT. WE ARE LITIGATING A VIOLATION OF THE ADEA,
10 AND THERE NEEDS TO BE A SHOWING OF DISCRIMINATION TO A
11 PROTECTED CLASS.

12 SO, I'LL DRAW YOUR ATTENTION TO A COUPLE OF THINGS I
13 POINTED OUT IN THE BEGINNING OF THE TRIAL. THE FIRST IS THAT
14 THE EVIDENCE STILL DOES NOT DEMONSTRATE THAT DR. KENNEDY WAS
15 OWED MORE THAN HIS PEERS. IN FACT, I THINK THAT'S BEEN
16 CONCEDED THAT THEY'RE ALL FAIRLY SIMILARLY QUALIFIED.

17 I THINK IT'S ALSO BEEN DR. KENNEDY'S TESTIMONY THAT HIS
18 IDEA OF FAIRNESS WOULD BE THAT IN THIS CHART HE WOULD BE PAID
19 ABOUT \$25,000 MORE THAN HIS PEERS. AND I WOULD ASK THE COURT
20 TO LOOK AT THE EVIDENCE TO ASK WHY THAT WOULD BE TRUE THAT HE
21 WOULD BE ENTITLED TO THAT AND WHETHER THAT'S FAIR.

22 ADDITIONALLY, WHAT THAT \$25,000 WOULD BE BASED ON. IN
23 PLAINTIFF'S CONSTRUCTION IT WOULD BE BASED ENTIRELY UPON ONE
24 OF THE SEVEN FACTORS WHICH IS LENGTH OF SERVICE IN THE VA.

25 NOW, HE HAS SAID THAT THE COMPENSATION PANEL MEMBERS DO

1 NOT CONSIDER THIS FACT. THE TESTIMONY ABSOLUTELY REFUTES
2 THAT. EVERY MEMBER OF THE COMPENSATION PANEL WHO GOT UP HERE
3 AND TESTIFIED CONFIRMED THAT THEY CONSIDERED ALL FACTORS.
4 THEY ALSO SAID THAT THERE WAS NOT ANY ASSIGNED WEIGHT
5 REQUIRED OF THEM TO GRANT ANY ONE OF THOSE FACTORS. THEY
6 SAID THEY CONSIDERED HIS TIME IN THE VA. I THINK THE DISPUTE
7 HERE IS HOW MUCH MONEY THEY WERE TO REWARD IT.

8 SO, I THINK THE EVIDENCE IS CLEAR THAT THAT'S REALLY THE
9 FOUNDATION OF THIS DISPUTE IN THE PLAINTIFF'S CASE;
10 DISCRIMINATION FOR -- AGAINST VA TENURE, WHICH DID NOT OCCUR
11 HERE. BUT EVEN IF IT DID, THAT'S NOT ACTIONABLE. AGE
12 DISCRIMINATION IS.

13 GO FORWARD A SLIDE. NOW, WE ARE NOT GOING TO DISPUTE
14 THE LANGUAGE IN THE STATUTE IS NOT A MODEL OF CLARITY. WHEN
15 I CAME TO THIS CASE, IT'S -- I THINK IT'S A NATURAL REACTION
16 TO HAVE SOME CONFUSION OVER THE TERMS MARKET PAY AND ANNUAL
17 PAY AND BASE PAY, AND WE HAVE TALKED ABOUT THOSE TERMS AT
18 INFINITUM THROUGHOUT THIS TRIAL. BUT THE POINT IS, AND I
19 THINK THAT ALL OF THE PARTIES AGREE, THAT THE VA WAS DOING
20 THE BEST JOB THAT IT COULD TO DESIGN REGULATIONS AND ENFORCE
21 THOSE REGULATIONS.

22 THE PLAINTIFF HIMSELF HAS TESTIFIED THAT MARKET PAY IS
23 DESIGNED TO BE ADDED ON TOP OF BASE PAY TO GET TO A
24 RELATIVELY COMPETITIVE LEVEL OF ANNUAL PAY. THIS
25 DISAGREEMENT WITH COUNSEL DURING THE EXAMINATION WAS NOT

1 ABOUT THAT QUESTION. INSTEAD IT WAS ABOUT WHAT EXACTLY THE
2 LEVEL OF MARKET PAY IT WAS OWED.

3 AND SO YOUR HONOR, I WOULD LOOK AT THE TESTIMONY -- WE
4 DON'T HAVE THE TRANSCRIPTS YET AVAILABLE TO US. THE CHART WE
5 ARE LOOKING AT HERE AGAIN IS THE AGES, AND WE SEE THE YEARS
6 OF ANESTHESIOLOGY EXPERIENCE WHICH ARE FAIRLY COMPARABLE.
7 CAN WE GO FORWARD ONE MORE? LET'S GO FORWARD TO THOSE FINAL
8 CHARTS.

9 YOUR HONOR, WE HAVE DISCUSSED THROUGH THE COURSE OF THE
10 TESTIMONY WHAT THE APPROPRIATE COHORT GROUP IS. WE WOULD BE
11 HAPPY TO SUBMIT ADDITIONAL BRIEFING ON THIS QUESTION.
12 OBVIOUSLY WE HAVE MADE OUR POINT THAT WE BELIEVE THAT THE
13 COHORT OF FIVE IS INSUFFICIENT AS A MATTER OF LAW AND AS A
14 MATTER OF FACT BECAUSE THE WITNESSES WHO TESTIFIED IN THIS
15 TRIAL TESTIFIED THAT AT THE DORN MEDICAL CENTER THERE'S
16 REALLY NO DIFFERENCE IN THE CALCULATION OF PAY AND THE
17 ENFORCEMENT OF THE PAY ACT AMONG ALL DOCTORS.

18 SO EVEN IF WE DON'T SEEK OUT A SAMPLE SIZE, REQUIRE A
19 SAMPLE SIZE AMONG DOCTORS NATION-WIDE -- EVEN THOUGH THE
20 TESTIMONY SUPPORTS THAT THE PAY ACT IS ENFORCED THE SAME WAY
21 NATION-WIDE AS WELL ON THE SAME FORMS -- AT LEAST WITHIN DORN
22 VA WE KNOW THAT IT'S BEING ENFORCED THE SAME WAY BY THE SAME
23 DOCTORS, THE SAME PANELISTS ACROSS PRACTICE GROUPS.

24 AND THE REASON WHY WE ARE NOT SEEING THAT EVIDENCE -- GO
25 TO THE NEXT SLIDE, PLEASE -- IS BECAUSE THE MINUTE WE DO, THE

1 THEORY FALLS APART. WE DON'T HAVE ANY DOCTORS OLDER THAN
2 KENNEDY IN HIS PROPOSED COHORT. WE ALSO DON'T HAVE ANYBODY
3 THERE WITH -- ANYBODY WHO IS OLDER THAN HIM WITH LESS VA
4 EXPERIENCE. AND SO HERE WE HAVE BROUGHT OUT EVIDENCE OF
5 COMPARATORS, WE HAVE PLAINTIFF'S EXHIBIT 5, PLAINTIFF'S
6 EXHIBIT 6 THAT SHOW THAT OLDER DOCTORS WHO ARE COMING INTO
7 THE VA SYSTEM ARE NOT BEING DISCRIMINATED AGAINST.

8 THE EFFECT THAT PLAINTIFF'S IDENTIFIED IS NOT COMING TO
9 BEAR ON THEIR PAY. AND IF IT'S NOT COMING TO BEAR ON THEIR
10 PAY, ON 73-YEAR-OLDS, ON 70-YEAR-OLDS, ON 69-YEAR-OLDS, THEN
11 HOW IS THIS A CASE OF AGE DISCRIMINATION, DISPARATE IMPACT
12 DISCRIMINATION AGAINST THE CLASS?

13 I THINK WE HAVE SEEN THROUGH THE COURSE OF THIS CASE
14 IT'S CLEAR THAT THE PLAINTIFF FEELS PERSONALLY VERY
15 AGGRIEVED, BUT THIS IS NO LONGER A DISPARATE TREATMENT CASE.
16 THERE NEEDS TO BE A SHOWING OF HARM TO AN ENTIRE CLASS.
17 THERE ALSO NEEDS TO BE A SHOWING OF A CORREL -- OF NOT JUST A
18 CORRELATION BUT A CAUSAL RELATIONSHIP BETWEEN THAT HARM AND
19 AGE. AND AS WE'VE DEMONSTRATED, THE CAUSAL RELATIONSHIP IS
20 YEARS OF SERVICE IN THE VA. GO FORWARD ONE MORE SLIDE. AND
21 AGAIN, THAT'S WHAT STANDS OUT TO DISTINGUISH PLAINTIFF FROM
22 HIS PEERS IN THE ANESTHESIOLOGY GROUP.

23 IT'S NOT AGE. IT'S NOT REALLY COMPARATIVE YEARS OF
24 ANESTHESIOLOGY EXPERIENCE, WHICH ARE PRETTY CLOSE. THE
25 BIGGEST DIFFERENCE BETWEEN EACH ONE OF THEM AND THE ONLY

1 FACTOR THAT AFFECTED THEIR BASE PAY AS IT RELATED TO THEIR
2 MARKET PAY PROPORTIONS IS THE YEARS OF SERVICE IN THE VA.

3 SO YOUR HONOR, WITH THAT WE BELIEVE THIS IS JUST NOT A
4 MERITORIOUS CASE OF AGE DISCRIMINATION. AND WE'D BE HAPPY IF
5 YOUR HONOR SO WISHES TO PROVIDE FURTHER BRIEFING ON ANY
6 PARTICULAR ISSUES YOU WOULD PROPOSE. THANK YOU.

7 THE COURT: ALL RIGHT. THANK YOU. ALL RIGHT. MR.
8 IRVIN?

9 MR. IRVIN: YOUR HONOR, JUST TO REMIND THE COURT
10 THAT ON THE ISSUE THAT I -- WE ARE GOING TO SUBMIT
11 AUTHORITY -- NEVER PLED, IT'S NOT BEEN AN ISSUE IN THE CASE,
12 BUT WE -- WE UNDERSTAND THE COURT'S CONCERN AND WE WILL BRIEF
13 IT FOR YOU.

14 THE COURT: I'M NOT -- WHAT WAS NEVER PLED?

15 MR. IRVIN: THE COHORT ISSUE AND THE FACT THAT
16 THOSE THAT ARE IN THE COHORT ARE ALL OF THE--

17 THE COURT: BUT IT IS A DISPARATE IMPACT CASE, AND
18 CERTAIN FACTORS THAT YOU HAVE TO SHOW IN A DISPARATE IMPACT
19 CASE AND THE CASE LAW IS VERY CLEAR AS TO HOW DO YOU -- HOW
20 YOU GO ABOUT PROVING AGE DISCRIMINATION IN A DISPARATE IMPACT
21 CASE. AND THERE IS CASE LAW ON WHO THE COMPARATORS ARE AND
22 WHAT THE SIZE OF THE CLASS HAS TO BE. SO, I -- IF YOU WANT
23 TO BRIEF THAT, THAT WILL BE FINE.

24 MR. IRVIN: YES, MA'AM. THANK YOU. I -- ALL I
25 CONTINUE TO SAY WAS THAT JUST NEVER HAD RAISED THAT AS A

1 DEFENSE IN THIS CASE THAT WE -- THAT THAT LAW APPLIED.

2 MR. ANDREWS: IT'S -- YOUR HONOR--

3 THE COURT: IT'S REALLY NOT A DEFENSE. IT'S
4 BASICALLY WHAT THE LAW IS AND -- IN THE CASE.

5 MR. ANDREWS: THANK YOU, YOUR HONOR. I WAS GOING
6 TO SAY IT'S THEIR BURDEN ACTUALLY TO DEMONSTRATE THAT. IT'S
7 NOT A DEFENSE WE NEED TO ASSERT.

8 THE COURT: ALL RIGHT. SO, WHEN DO YOU THINK YOU
9 COULD SUBMIT THAT ADDITIONAL BRIEFING?

10 MR. IRVIN: BY -- YOUR HONOR, BY THE END OF NEXT
11 WEEK. TOMORROW IS FRIDAY. GET YOU SOMETHING NEXT WEEK ON
12 IT.

13 THE COURT: OKAY.

14 MR. IRVIN: THANK YOU.

15 THE COURT: AND GOVERNMENT?

16 MR. ANDREWS: DOES YOUR HONOR PREFER SIMULTANEOUS
17 BRIEFING OR...

18 THE COURT: I MEAN, YEAH, BECAUSE...

19 MR. ANDREWS: WE'D LIKE THE OPPORTUNITY TO RESPOND
20 IF WE COULD -- OR SIMULTANEOUSLY?

21 THE COURT: SIMULTANEOUSLY.

22 MR. ANDREWS: WE CAN DO THAT. NEXT FRIDAY THEN?

23 THE COURT: YES.

24 MR. ANDREWS: YES, MA'AM.

25 THE COURT: THANK YOU. ALL RIGHT. ANYTHING ELSE?

1 MR. IRVIN: NOTHING ELSE FROM US, YOUR HONOR.

2 THE COURT: THANK YOU VERY MUCH. APPRECIATE IT.

3 (HEARING CONCLUDED.)

4 ***

5 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
6 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

7
8 S/KATHLEEN RICHARDSON

9 ----- AUGUST 28, 2018

10 KATHLEEN RICHARDSON, RMR, CRR

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